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David S. Rudstein

*IIT Chicago-Kent College of Law*, [drudstei@kentlaw.iit.edu](mailto:drudstei@kentlaw.iit.edu)

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# Double Jeopardy and the Fraudulently-Obtained Acquittal

David S. Rudstein\*

## I. INTRODUCTION

On December 8, 1993, a Cook County, Illinois, grand jury returned an indictment<sup>1</sup> charging Harry Aleman, a reputed crime syndicate assassin, with the murder of William Logan, a truck dispatcher and Teamsters union steward, who was shot to death outside his home in Chicago in 1972.<sup>2</sup> Indictments for murder are not uncommon in Cook County. What is unusual about this particular indictment, however, is that Aleman previously had been acquitted of Logan's murder, having been found not guilty following a bench trial in 1977.<sup>3</sup>

At first glance it would appear that the Double Jeopardy Clause of the Fifth Amendment<sup>4</sup> bars the second prosecution of Aleman and prohibits the

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\* Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology; B.S., University of Illinois, 1968; J.D., Northwestern University, 1971; LL.M., University of Illinois, 1975. The Marshall Ewell Research Fund at Chicago-Kent College of Law provided funding for this article. I want to thank my colleague Harold Krent for his helpful comments and suggestions, and my colleague John Stryzinski for tracking down some of the obscure materials I needed for my research.

1. Indictment No. 93 CR 28787.

2. Prosecutors suspect the crime syndicate ordered Logan killed because he refused to go along with a hijacking scheme. See John O'Brien, *Exception to Double Jeopardy*, CHI. TRIB., Oct. 13, 1994, § 1, at 20.

At the time of his indictment, Aleman was in a federal prison serving a twelve-year sentence for extortion that had been imposed a year earlier. He had been in custody on one conviction or another for fifteen of the previous sixteen years. In addition to indicting Aleman for the murder of Logan, the grand jury indicted him for the slaying of an independent bookmaker in October 1975.

3. On May 24, 1977, Cook County Circuit Court Judge Frank Wilson acquitted Aleman of the murder. Aleman had presented an alibi defense, introducing evidence that at the time of the killing he had been at a driving range hitting golf balls. See William Grady, *Retrial Will Test Limits of Double Jeopardy*, CHI. TRIB., Dec. 13, 1993, § Perspective, at 1.

4. U.S. CONST. amend. V provides, in part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." This provision applies to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1937)).

state of Illinois from forcing him to defend himself a second time for the same offense. Cook County State's Attorney Jack O'Malley contends, however, that the guarantee against double jeopardy does not protect Aleman because his acquittal resulted from a \$10,000 bribe paid to the trial judge by a corrupt lawyer at the behest of local politicians with ties to the crime syndicate.<sup>5</sup> According to O'Malley, Aleman was never in "jeopardy" at his first trial. On October 12, 1994, a circuit court judge accepted O'Malley's legal argument and refused to grant Aleman's motion to dismiss the 1993 indictment on double jeopardy grounds.<sup>6</sup> On March 9, 1995, following an evidentiary hearing, the judge concluded that the judge at Aleman's first trial had been bribed to find Aleman not guilty, and that, therefore, the guarantee against double jeopardy does not protect Aleman from being retried for Logan's murder.<sup>7</sup> On March 30, 1995, Aleman appealed the denial of his motion to dismiss the 1993 indictment to the Illinois Appellate Court. The appeal is pending.

The reprosecution of Harry Aleman raises an interesting question concerning the effect under the Double Jeopardy Clause of an acquittal resulting from fraud. This article examines that question and concludes that the safeguard against double jeopardy prevents the government from retrying an individual following her acquittal for the same offense, even though that acquittal may have been obtained through bribery, blackmail, intimidation, or the like.

## II. THE DOUBLE JEOPARDY CLAUSE<sup>8</sup>

"Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization."<sup>9</sup> Its roots can be traced to the early Greeks and Romans.<sup>10</sup> By Blackstone's time, the notion that one trial and one punishment are enough was considered a

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5. According to prosecutors, members of the crime syndicate wanted Aleman back on the streets where he could be of continued service to them. See O'Brien, *supra* note 2, at 20.

6. *People v. Aleman*, 1994 WL 684499, \*20 (Ill. Cir. Ct. Oct. 12, 1994) (interim ruling on motion to dismiss) (refusing to grant motion to dismiss and staying entry of final order pending resolution of factual issues).

7. See Gary Marx, *Aleman Can Be Retried, Double Jeopardy Doesn't Apply*, CHI. TRIB., March 10, 1995, § 1, at 1.

8. See generally 2 DAVID S. RUDSTEIN ET AL., CRIMINAL CONSTITUTIONAL LAW ¶ 11.01[3] (1994).

9. *Bartkus v. Illinois*, 359 U.S. 121, 151 (1959) (Black, J., dissenting).

10. *Benton v. Maryland*, 395 U.S. 784, 795 (1969); *Bartkus*, 359 U.S. at 151-52 (Black, J., dissenting).

"universal maxim of the common law of England."<sup>11</sup> The principle was brought to America by the earliest settlers,<sup>12</sup> and was eventually incorporated into the Fifth Amendment to the United States Constitution.<sup>13</sup>

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."<sup>14</sup> This provision, which applies to the states through the Due Process Clause of the Fourteenth Amendment,<sup>15</sup> protects against a second prosecution for the same offense, by the same sovereign,<sup>16</sup> following conviction,<sup>17</sup> following acquittal,<sup>18</sup> and, in some circumstances, following

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11. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND \*335; *see also* *United States v. Wilson*, 420 U.S. 332, 340 (1975); *Benton*, 395 U.S. at 795; *Bartkus*, 359 U.S. at 152-53 (Black, J., dissenting). For a brief history of double jeopardy in English law, *see* MARTIN L. FRIEDLAND, DOUBLE JEOPARDY 5-15 (1969).

12. *Bartkus*, 359 U.S. at 153 (Black, J., dissenting).

13. *See Wilson*, 420 U.S. at 340-42; *see generally* JAY A. SIGLER, DOUBLE JEOPARDY 21-34 (1969).

14. U.S. CONST. amend. V.

15. *Benton*, 395 U.S. at 794 (overruling *Palko v. Connecticut*, 302 U.S. 319 (1937)).

U.S. CONST. amend. XIV, § 1 provides, in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

16. Under the so-called "dual sovereignty" doctrine, *see generally* RUDSTEIN ET AL., *supra* note 8, at ¶ 11.01[3][c] (1993-94), the prosecution of an individual by one sovereign, such as the federal government or a state, does not bar a subsequent prosecution of that same individual by a different sovereign, even though the Double Jeopardy Clause would have barred the second prosecution had it been brought by the first sovereign. *E.g.*, *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (holding that Alabama prosecution for capital offense of murder during kidnapping not barred by previous Georgia conviction for murder); *United States v. Wheeler*, 435 U.S. 313, 316-18 (1978) (holding that federal prosecution for statutory rape not barred by previous conviction in Indian tribal court for lesser-included offense of contributing to delinquency of minor); *Abbate v. United States*, 359 U.S. 187, 196 (1959) (holding that federal prosecution for conspiring to destroy telephone company property not barred by previous Illinois conviction for conspiring to injure or destroy property of another); *see also* *Bartkus v. Illinois*, 359 U.S. 121, 139 (1959) (declaring that Illinois prosecution for armed robbery not barred, under Due Process Clause of Fourteenth Amendment, by previous federal acquittal on charge of robbing federally insured savings and loan institution). The Supreme Court has explained that a crime constitutes an offense against the sovereignty of the government, so that "[w]hen a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, [she] has committed two distinct 'offences.'" *Heath*, 474 U.S. at 88 (citing *United States v. Lanza*, 260 U.S. 377, 382 (1922)).

17. *E.g.*, *United States v. Dixon*, 113 S. Ct. 2849, 2857-58 (1993) (opinion of Scalia, J.); *id.* at 2874 (White, J., concurring in part and dissenting in part); *id.* at

the premature termination of a trial.<sup>19</sup> In addition, it protects against multiple punishments by the same sovereign<sup>20</sup> for the same offense.<sup>21</sup> Although the text of the Double Jeopardy Clause mentions only harms to "life or limb," it is well settled that the provision covers imprisonment and monetary penalties,<sup>22</sup> and applies in proceedings involving misdemeanors as well as felonies.<sup>23</sup>

A number of policy considerations underlie the guarantee against double jeopardy. By barring reprosecution following an acquittal or a conviction, it

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2890-91 (Souter, J., concurring in part and dissenting in part); *Harris v. Oklahoma*, 433 U.S. 682, 682-83 (1977) (per curiam); *Brown v. Ohio*, 432 U.S. 161, 168-69 (1977); *Breed v. Jones*, 421 U.S. 519, 541 (1975); *In re Nielsen*, 131 U.S. 176, 187-90 (1889).

18. *E.g.*, *Smalis v. Pennsylvania*, 476 U.S. 140, 145-46 (1986); *Sanabria v. United States*, 437 U.S. 54, 78 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575-76 (1977); *Benton*, 395 U.S. at 796; *United States v. Sisson*, 399 U.S. 267, 288-90 & n.18 (1970); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962) (per curiam); *Green v. United States*, 355 U.S. 184, 190-91 (1957); *Ball v. United States*, 163 U.S. 662, 671 (1896); *see also Arizona v. Rumsey*, 467 U.S. 203, 211-12 (1984) (capital punishment sentencing hearing); *Bullington v. Missouri*, 451 U.S. 430, 445-46 (1981) (same); *Hudson v. Louisiana*, 450 U.S. 40, 44-45 (1981) (after granting defendant's posttrial motion for new trial on ground evidence insufficient to support jury's guilty verdict); *Burks v. United States*, 437 U.S. 1, 18 (1978) (following appellate court's reversal of conviction on ground evidence insufficient to support jury's verdict); *Ashe v. Swenson*, 397 U.S. 436, 445-47 (1970) (Double Jeopardy Clause incorporates doctrine of collateral estoppel, which can bar prosecution following acquittal for related offense).

19. *E.g.*, *United States v. Jorn*, 400 U.S. 470, 486-87 (1971) (plurality opinion) (resulting when mistrial declared *sua sponte* so prosecution witnesses could consult with attorneys about their constitutional rights); *id.* at 488 (Black & Brennan, JJ., concurring) (same); *Downum v. United States*, 372 U.S. 734, 737-38 (1963) (resulting when mistrial declared at prosecution's request, and over defendant's objection, because prosecution's key witness not present).

20. *See supra* note 16.

21. *E.g.*, *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994); *United States v. Halper*, 490 U.S. 435, 448-49 (1989); *North Carolina v. Pearce*, 395 U.S. 711, 718-19 (1969); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176 (1874). *But see Witte v. United States*, 115 S. Ct. 2199, 2210 (1995) (Scalia, J., concurring) (quoting *Kurth Ranch*, 114 S. Ct. at 1959 (Scalia, J., dissenting)) ("I adhere to my view that the Double Jeopardy Clause prohibits successive prosecution, not successive punishment.").

22. *Kurth Ranch*, 114 S. Ct. at 1941 n.1.

23. *Lange*, 85 U.S. (18 Wall.) at 172-73; *see also Breed v. Jones*, 421 U.S. 519, 529-31 (1975) (applying double jeopardy provision to delinquency proceeding where object of proceeding is to determine whether juvenile engaged in conduct violating criminal statute and potential consequences include loss of liberty).

preserves the finality of judgments,<sup>24</sup> thereby assuring an individual that, except in limited situations, she will not be forced to defend herself a second time for the same offense,<sup>25</sup> and "protect[ing] [her] from attempts to relitigate the facts underlying a prior acquittal and from attempts to secure additional punishment after a prior conviction and sentence."<sup>26</sup> As the Supreme Court explained in *Green v. United States*:<sup>27</sup>

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting [her] to embarrassment, expense and ordeal and compelling [her] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent [she] may be found guilty.<sup>28</sup>

By barring reprosecution in some circumstances following the premature termination of a defendant's trial, the guarantee helps to protect a defendant's "valued right to have [her] trial completed by a particular tribunal,"<sup>29</sup> that is, her interest in "being able, once and for all, to conclude [her] confrontation with society through the verdict of a tribunal [she] might believe to be

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24. *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980); *Crist v. Bretz*, 437 U.S. 28, 33 (1978); *Arizona v. Washington*, 434 U.S. 497, 503 (1978); *Brown v. Ohio*, 432 U.S. 161, 165 (1977); *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion); see also *United States v. Wilson*, 420 U.S. 332, 352 (1975).

25. *Smalis v. Pennsylvania*, 476 U.S. 140, 143 n.4 (1986); *Ohio v. Johnson*, 467 U.S. 493, 498 (1984); *DiFrancesco*, 449 U.S. at 127; *Breed*, 421 U.S. at 529-30; *Abney v. United States*, 431 U.S. 651, 661 (1977); *Abbate v. United States*, 359 U.S. 187, 198-99 (1959) (opinion of Brennan, J.).

26. *Brown*, 432 U.S. at 165-66.

27. 355 U.S. 184 (1957).

28. *Id.* at 187-88; accord *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 307 (1984); *Bullington v. Missouri*, 451 U.S. 430, 445 (1981); *DiFrancesco*, 449 U.S. at 127-28; *United States v. Scott*, 437 U.S. 82, 87 (1978); *Crist*, 437 U.S. at 35; *Washington*, 434 U.S. at 504 n.13; *Abney*, 431 U.S. at 661-62; *United States v. Dinitz*, 424 U.S. 600, 606 (1976); *Serfass v. United States*, 420 U.S. 377, 387-88 (1975); *United States v. Wilson*, 420 U.S. 332, 343 (1975); *Jorn*, 400 U.S. at 479 (plurality opinion); *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969).

29. *Crist*, 437 U.S. at 35-36 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)); accord *Richardson v. United States*, 468 U.S. 317, 325 (1984); *Oregon v. Kennedy*, 456 U.S. 667, 671-72 (1982); *DiFrancesco*, 449 U.S. at 128; *Swisher v. Brady*, 438 U.S. 204, 215 (1978); *Scott*, 437 U.S. at 100-01; *Washington*, 434 U.S. at 503, 509; *Dinitz*, 424 U.S. at 606; *Jorn*, 400 U.S. at 484 (plurality opinion); *Downum v. United States*, 372 U.S. 734, 736 (1963).

favorably disposed to [her] fate."<sup>30</sup> Finally, the guarantee recognizes the injustice inherent in punishing an individual twice for the same offense.<sup>31</sup>

### III. PROSECUTION FOR THE SAME OFFENSE FOLLOWING AN ACQUITTAL<sup>32</sup>

The Supreme Court has asserted that "[t]he law 'attaches particular significance to an acquittal'"<sup>33</sup> and that an acquittal<sup>34</sup> *absolutely* bars a

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30. *Washington*, 434 U.S. at 514 (quoting *U.S. v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion)).

31. *Schiro v. Farley*, 114 S. Ct. 783, 789 (1994); *United States v. Halper*, 490 U.S. 435, 440 (1989); *North Carolina v. Pearce*, 395 U.S. 711, 728-29 (1969) (Douglas, J., concurring); *United States v. Ewell*, 383 U.S. 116, 124 (1966); *Abbate v. United States*, 359 U.S. 187, 203 (1959) (Black, J., dissenting); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 168-69 (1873); *see also* *Department of Revenue v. Kurth Ranch*, 114 S. Ct. 1937, 1948 (1994).

The Supreme Court in *Halper* stated: "[W]hen the Government already has imposed a criminal penalty and seeks to impose additional punishment in a second proceeding, the Double Jeopardy Clause protects against the possibility that the Government is seeking the second punishment because it is dissatisfied with the sanction obtained in the first proceeding." *Halper*, 490 U.S. at 451 n.10; *see also* *Pearce*, 395 U.S. at 734 (Douglas, J., concurring) ("[The ban on double jeopardy] prevents the State, following conviction from retrying the defendant again in the hope of securing a greater penalty.").

32. *See generally* RUDSTEIN ET AL., *supra* note 8, at ¶ 11.01[3][g] (1993).

33. *DiFrancesco*, 449 U.S. at 129 (quoting *U.S. v. Scott*, 437 U.S. 82, 91 (1978)).

34. For purposes of double jeopardy analysis, what constitutes an acquittal by a trial judge is not controlled by the form of the judge's action. *See Scott*, 437 U.S. at 96; *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Rather, an accused is acquitted "when the 'ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" *Scott*, 437 U.S. at 97 (quoting *Martin Linen Supply Co.*, 430 U.S. at 571).

A trial judge's ostensible "acquittal" of an accused may not in fact constitute an acquittal for double jeopardy purposes. *Scott*, 437 U.S. at 97 (quoting *Martin Linen Supply Co.*, 430 U.S. at 572) ("Where the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed. R. Crim. P. 29, appeal will be barred only when 'it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction.'"). This might explain the result reached by the Illinois courts in *People v. Deems* and its progeny. *See People v. Deems*, 410 N.E.2d 8 (Ill. 1980), *cert. denied*, 450 U.S. 925 (1981); *People v. Rudi*, 469 N.E.2d 580, 583-84 (Ill. 1984), *cert. denied*, 469 U.S. 1228 (1985); *People v. Hollan*, 491 N.E.2d 1372, 1373-74 (Ill. App. Ct. 1986); *People v. Davies*, 483 N.E.2d 435, 437-38 (Ill. App. Ct. 1985); *People v. Verstat*, 444 N.E.2d

1374, 1379-80 (Ill. App. Ct. 1983); *People v. Edwards*, 422 N.E.2d 1117, 1119-20 (Ill. App. Ct. 1981).

In *Deems*, on the date set for the defendant's trial on an indictment charging him with receiving stolen property, the prosecutor conceded the defendant was not guilty of that offense and moved to dismiss the indictment so he could seek an indictment for theft. *Deems*, 410 N.E.2d at 9. The defendant, however, demanded an immediate trial on the original charge. *Id.* at 10. Likening the prosecutor's motion to a request for a continuance, the trial judge concluded the accused was entitled to go to trial. *Id.* The judge would have preferred to dismiss the case with prejudice for want of prosecution but lacked the power to do so. *Id.* He therefore decided to call the case for trial and acquit the defendant. Accordingly, the defendant waived a jury trial. Neither party presented an opening statement, and the prosecutor stated he had no witnesses to call. *Id.* The defendant was the only witness sworn, and he did not testify. The judge found the defendant not guilty and entered a judgment of acquittal. *Id.* The government subsequently indicted the defendant for theft, but the trial court dismissed that charge on double jeopardy grounds. *Id.* On appeal, the Supreme Court of Illinois reversed the dismissal of the theft indictment and vacated the judgment of "acquittal" on the receiving stolen property indictment. *Id.* at 12. The court reasoned that while the trial judge labeled his action an "acquittal," it bore none of the characteristics of a true "acquittal" and that the so-called "trial" the judge conducted was merely an artifice employed by him to achieve the result he could not accomplish directly, namely, dismissal of the indictment with prejudice for want of prosecution. *Id.* at 10-11. The court noted that neither the prosecutor nor the defendant introduced any evidence, and that the prosecutor in fact made no attempt to convict the defendant. *Id.* The court therefore concluded that jeopardy never attached because the defendant never faced the risk of being found guilty of any offense. *Id.* at 11.

As the Supreme Court of Illinois pointed out, not even the semblance of a trial occurred in *Deems*—the prosecutor made no attempt to convict the accused, neither party made opening statements, no witnesses testified, and no evidence was introduced. *Id.* at 10-11. That case consequently can be read as holding that the ruling of the trial judge in the receiving stolen property proceeding did not constitute an "acquittal" for double jeopardy purposes because it did not even purport to "represent[] a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged," *Scott*, 437 U.S. at 97 (quoting *Martin Linen Supply Co.*, 430 U.S. at 571) (first brackets added), but rather constituted a pretrial dismissal of the indictment for want of prosecution and should be treated as such for purposes of double jeopardy analysis, even though the defendant was sworn as a witness. Indeed, in *People v. Rudi*, which involved a "trial" similar to the one in *Deems*, the Illinois Supreme Court stated: "The 'trial' or 'acquittal' in this case was no more than a dismissal for want of prosecution, and as we held in *Deems* such dismissals do not put the defendant in jeopardy or bar retrial on a new indictment." *People v. Rudi*, 469 N.E.2d 580, 584 (Ill. 1984) (emphasis added), *cert. denied*, 469 U.S. 1228 (1985). So interpreted, *Deems* does not create an exception to normal double jeopardy principles for an "acquittal" obtained in a "sham trial," as asserted by the trial judge in *People v. Aleman*. *People v. Aleman*, 1994 WL 684499, \*9 and \*10 (Ill. Cir. Ct. Oct. 12,



second trial for the same offense.<sup>35</sup> In *United States v. DiFrancesco*,<sup>36</sup> the

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1994) (interim ruling on defendant's motion to dismiss indictments) (citing *Deems*, 410 N.E.2d at 11).

However, even if *Deems* does purport to create an exception to normal double jeopardy principles, it (and its progeny) may well be wrongly decided, for, in a bench trial, jeopardy attaches when the first witness is sworn. *Crist v. Bretz*, 437 U.S. 28, 32-33 (1978). In *Goolsby v. Hutto*, a federal habeas corpus action involving facts similar to those in *Deems*, the court held that the Virginia trial court's dismissal of a misdemeanor charge for lack of evidence, after it had called and sworn a witness, barred a subsequent prosecution of the defendant for a greater-inclusive offense based upon the same act, even though the prosecutor had refused to question the witness and the witness did not testify. *Goolsby v. Hutto*, 691 F.2d 199, 199-200 (4th Cir. 1982). The court stated:

[W]e think the Commonwealth is attempting to do what the double jeopardy clause is designed to prevent; it is making repeated attempts to convict Goolsby. It is attempting to circumvent the Virginia statute which gives the court discretionary power to grant a motion for *nolle prosequi*, and because it does not agree with the Virginia court's disposition of the case, it has elected to subject Goolsby to another trial by further indictment.

We also believe that Goolsby was put to trial before the trier of facts. When the general district court denied the motion for *nolle prosequi*, set the case for trial, and called and swore the first witness, Goolsby was then subjected either to conviction or acquittal. The fact that the witness gave no evidence required the acquittal of Goolsby by the general district court[.] *Id.* at 201-02; *accord* *People v. Brower*, 416 N.W.2d 397, 399 (Mich. Ct. App. 1987), *cert. denied*, 488 U.S. 933 (1988). *But see* *State v. Clark*, 723 S.W.2d 17, 20-21 (Mo. Ct. App. 1986) (jeopardy attaches only upon introduction of evidence, thus defendant not placed in jeopardy where witnesses sworn but did not testify).

35. *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("A verdict of not guilty, whether rendered by the jury or directed by the trial judge, *absolutely* shields the defendant from retrial.") (emphasis added); *Bullington v. Missouri*, 451 U.S. 430, 445 (1981) ("A verdict of acquittal on the issue of guilt or innocence is, of course, *absolutely* final.") (emphasis added); *DiFrancesco*, 449 U.S. at 129 ("The constitutional protection against double jeopardy *unequivocally* prohibits a second trial following an acquittal' . . .") (emphasis added); *Sanabria v. United States*, 437 U.S. 54, 75 (1978) ("[T]here is *no exception* permitting retrial once the defendant has been acquitted, no matter how 'egregiously erroneous' the legal rulings leading to that judgment might be.") (emphasis added); *Burks v. United States*, 437 U.S. 1, 16 (1978) ("[W]e necessarily afford *absolute* finality to a jury's verdict of acquittal—no matter how erroneous its decision . . .") (emphasis added and emphasis deleted); *Washington*, 434 U.S. at 503 ("The constitutional protection against double jeopardy *unequivocally* prohibits a second trial following an acquittal.") (emphasis added).

The Supreme Court held in *United States v. Wilson* that the Double Jeopardy Clause does not prevent the government from appealing a ruling of the trial judge in favor of the accused entered after a verdict of guilty was returned by the jury. *United*

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*States v. Wilson*, 420 U.S. 332, 352-53 (1975). The Court reasoned that a reversal on appeal would not necessitate a second trial of the accused, but rather would result only in the reinstatement of the jury's verdict of guilty. *Id.* at 353. Although *Wilson* involved the trial judge's dismissal of an indictment on the ground of prejudicial pre-indictment delay, in the companion case of *United States v. Jenkins*, the Court assumed that the holding in *Wilson* applied when a trial judge entered a postverdict judgment of acquittal based upon his finding that the evidence was insufficient to support the jury's verdict of guilty. *United States v. Jenkins*, 420 U.S. 358, 365 (1975), *overruled on other grounds by* *United States v. Scott*, 437 U.S. 82, 101 (1978). The Court in *Jenkins* stated:

When [the] principle [enunciated in *Wilson*] is applied to the situation where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal, an appeal is permitted. In that situation a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by the entry of a judgment on the verdict. To be sure, the defendant would prefer that the Government not be permitted to appeal or that the judgment of conviction not be entered, but this interest of the defendant is not one that the Double Jeopardy Clause was designed to protect.

*Id.* at 365. Following *Jenkins* and *Wilson*, a number of lower courts have reached this result. *E.g.*, *United States v. Mundt*, 846 F.2d 1157, 1160 n.4 (8th Cir. 1988); *Virgin Islands v. Josiah*, 641 F.2d 1103, 1108 (3d Cir. 1981); *People v. Gennings*, 583 P.2d 908, 910 (Colo. 1978); *People v. Coe*, 470 N.Y.S.2d 687, 688 (N.Y. App. Div. 1984). The principle asserted in *Jenkins* and applied in these cases does not, however, conflict with the Supreme Court's statements that an acquittal is absolutely final. Rather, these statements by the Court refer to the situation where the jury or judge *initially* renders a verdict or finding of not guilty, not where the jury initially convicts the defendant and the trial judge nevertheless sets aside the jury's verdict and enters a judgment of acquittal. The Supreme Court made this clear in *Wilson* where it distinguished the two situations:

[W]e continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal. Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal. These interests, however, do not apply in the case of a postverdict ruling of law by a trial judge. Correction of an error of law at that stage would not grant the prosecutor a new trial or subject the defendant to the harassment traditionally associated with multiple prosecutions.

420 U.S. at 352 (footnote omitted).

Court explained:

An acquittal is accorded special weight. "The constitutional protection against double jeopardy *unequivocally* prohibits a second trial following an acquittal," for the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.' . . . If the innocence of the accused has been confirmed by a final judgment, the Constitution presumes that a second trial would be unfair . . . ." <sup>37</sup>

For example, in *Fong Foo v. United States*,<sup>38</sup> after seven days of trial and the testimony of several witnesses in what promised to be a lengthy proceeding, the trial judge abruptly terminated the government's case by directing the jury to return verdicts of acquittal, after which he entered a formal judgment of acquittal. The trial judge based his action upon one or both of two grounds: (1) supposed prosecutorial misconduct by the Assistant United States Attorney trying the case and (2) a supposed lack of credibility in the testimony of the government's witnesses who had testified up to that point.<sup>39</sup> The government obtained a writ of mandamus from the Court of Appeals directing that the judgment of acquittal be vacated and that the case be reassigned for trial,<sup>40</sup> but the Supreme Court reversed. The Court held that because of the final verdict of acquittal, the Double Jeopardy Clause barred the retrial of the defendants, even if the trial judge lacked the power to direct the acquittals under the circumstances and committed egregious error in doing so.<sup>41</sup>

Particular significance is accorded an acquittal because allowing a second prosecution after a judgment of not guilty would increase the risk of an erroneous conviction,<sup>42</sup> first, by giving the government an opportunity to

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36. 449 U.S. 117 (1980).

37. *Id.* at 129 (quoting *Arizona v. Washington*, 434 U.S. 497, 503 (1978) and *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)) (emphasis added).

38. 369 U.S. 141 (1962) (per curiam).

39. *Id.* at 142.

40. *In re United States*, 286 F.2d 556 (1st Cir. 1961) (holding that under the circumstances the trial court lacked power to terminate the government's presentation of its case by entering judgment of acquittal).

41. *Fong Foo*, 369 U.S. at 143; *see also Smalis v. Pennsylvania*, 476 U.S. 140, 144-45 & n.7 (1986) (granting of defendants' demurrer and dismissal of certain charges by trial judge, at close of government's case, constituted acquittal and barred further trial proceedings on those charges, even if trial judge erroneously interpreted governing legal principles).

42. *DiFrancesco*, 449 U.S. at 130; *accord Poland v. Arizona*, 476 U.S. 147, 156 (1986); *United States v. Scott*, 437 U.S. 82, 91 (1978).

rehearse the presentation of its case<sup>43</sup> and to "learn[] . . . about the strengths of the defense case and the weaknesses of its own,"<sup>44</sup> and, second, by permitting the government, with its vastly superior resources, to wear down the accused through repeated trials.<sup>45</sup>

The Double Jeopardy Clause's absolute prohibition of a second trial for the same offense following an acquittal applies only when the acquittal was in a court having jurisdiction over both the defendant and the subject matter. For the double jeopardy provision "does not come into play until a proceeding begins before a trier 'having jurisdiction to try the question of the guilt or innocence of the accused.'"<sup>46</sup> Thus, on two occasions the Supreme Court has indicated that the government may prosecute an individual a second time for the same offense where the court entering the initial judgment of acquittal lacked jurisdiction. In *Ball v. United States*,<sup>47</sup> the Court stated: "An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction."<sup>48</sup> Similarly, in *Grafton v. United States*,<sup>49</sup> the Court said: "We assume as indisputable, on principle and authority, that before a person can be said to have been put in jeopardy of life or limb the court in which he was acquitted . . . must have had jurisdiction to try him for the offense charged."<sup>50</sup>

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43. *Grady v. Corbin*, 495 U.S. 508, 518 (1990), *overruled by* *United States v. Dixon*, 113 S. Ct. 2849 (1993).

44. *DiFrancesco*, 449 U.S. at 128 (also stating that "'central to the objective of the prohibition against successive trials' is the barrier to 'affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding'"); *see also* *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("This prohibition [against a second trial following an acquittal] prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction."); *United States v. Wilson*, 420 U.S. 332, 352 (1975) ("Granting the Government [the right to appeal an acquittal] would permit [the prosecutor] to re-examine the weaknesses in his first presentation in order to strengthen the second . . .").

45. *DiFrancesco*, 449 U.S. at 130; *accord* *Poland*, 476 U.S. at 156; *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 307 (1984); *Scott*, 437 U.S. at 91.

46. *Serfass v. United States*, 420 U.S. 377, 391 (1975) (quoting *Kepner v. United States*, 195 U.S. 100, 133 (1904)); *see also* BLACKSTONE, *supra* note 11, at \*335 ("[W]hen a man is once fairly found not guilty upon any indictment, or other prosecution, *before any court having competent jurisdiction of the offence*, he may plead such acquittal in bar of any subsequent accusation for the same crime.") (emphasis added).

47. 163 U.S. 662 (1896).

48. *Id.* at 669.

49. 206 U.S. 333 (1907).

50. *Id.* at 345; *see, e.g., United States v. Khan*, 822 F.2d 451, 454, 455 (4th Cir.

The fact that under the so-called "dual sovereignty" doctrine<sup>51</sup> an acquittal in a prosecution brought by one sovereign, such as the federal government or a state, does not bar a subsequent prosecution brought by a different sovereign against the same defendant for the same act<sup>52</sup> is not inconsistent with the rule that the Double Jeopardy Clause absolutely bars a second trial for the same offense. As the Supreme Court explained in *Heath v. Alabama*,<sup>53</sup> a crime constitutes an offense against the sovereignty of the government.<sup>54</sup> Accordingly, successive prosecutions by different sovereigns do not place a defendant twice in jeopardy "for the same offence," as prohibited by the Double Jeopardy Clause; rather, "by one act [she] has committed two offences, for each of which [she] is justly punishable."<sup>55</sup>

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1987); *State v. Mesman*, 488 So. 2d 1296, 1298 (La. Ct. App. 1986); *State v. Hamilton*, 754 P.2d 857, 859 (N.M. Ct. App. 1988), *cert. denied*, 753 P.2d 1320 (N.M. 1988); *see also* *Schlang v. Heard*, 691 F.2d 796, 798 (5th Cir. 1982) (deciding that trial court lacked jurisdiction, and thus jeopardy did not attach, because information fatally defective for failing to allege required mental state, so that even if evidence at trial insufficient to convict, retrial not barred by Double Jeopardy Clause), *appeal dismissed and cert. denied*, 461 U.S. 951 (1983); *Stephens v. Zant*, 631 F.2d 397, 400-01 (5th Cir.) (quoting *Ball and Grafton*), *modified on other grounds*, 648 F.2d 446 (5th Cir. 1980), *cert. denied*, 454 U.S. 1035 (1981), *different question certified*, 451 U.S. 410 (1982).

The government also may try a defendant a second time where the defendant's first trial in a court lacking jurisdiction resulted in a conviction, either following a trial, *e.g.*, *Woodring v. United States*, 337 F.2d 235, 236-37 (9th Cir. 1964), *cert. denied*, 380 U.S. 933 (1965); *Jackett v. State*, 432 S.E.2d 586 (Ga. Ct. App. 1993); *Commonwealth v. Keenan*, 530 A.2d 90, 93-95 (Pa. Super. Ct. 1987) (but holding subsequent prosecution barred by Double Jeopardy Clause if government intentionally tried defendant in court it knew or should have known lacked jurisdiction); *State v. Kenney*, 523 A.2d 853, 855 (R.I. 1987), or a plea of guilty. *E.g.*, *People v. Brancoccio*, 634 N.E.2d 954, 956 (N.Y. 1994); *State v. Hazzard*, 743 S.W.2d 938, 941 (Tenn. Crim. App. 1987); *Hoang v. State*, 872 S.W.2d 694, 698 (Tex. Crim. App. 1993), *cert. denied*, 115 S. Ct. 177 (1994).

51. *See supra* note 16.

52. *See* *Bartkus v. Illinois*, 359 U.S. 121, 139 (1959) (holding that Illinois prosecution for armed robbery not barred by previous acquittal in federal prosecution for robbery of federally insured savings and loan institution).

53. 474 U.S. 82 (1985).

54. *Id.* at 88.

55. *Id.* (quoting *Moore v. Illinois*, 55 U.S. (14 How.) 13, 20 (1852)); *see also* *United States v. Lanza*, 260 U.S. 377, 382 (1922).

In England, Parliament enacted a statute in 1487, creating a limited exception to the rule that a defendant could plead *autrefois acquit* (a former acquittal)—a plea upon which the Fifth Amendment's guarantee against double jeopardy is based, *see* *United States v. Scott*, 437 U.S. 82, 87 (1978) ("The constitutional provision had its origin in

the three common law pleas of *autrefois acquit*, *autrefois convict*, and pardon.")—to bar a subsequent prosecution for the same offense. 3 Hen. 7, ch. 1 (1487) (Eng.). In very early times, a private subject could bring a suit against another demanding punishment for the particular wrong he suffered, rather than for the offense against the public. BLACKSTONE, *supra* note 11, at \*312. This method of prosecution, known as an "appeal," existed alongside methods of prosecution at the suit of the king, i.e., presentment, indictment, and information, *id.* at \*302-12, although by the thirteenth century it could be used only for serious offenses. 2 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 257 (1923); *see generally* 2 WILLIAMS HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 155-204 (1721); BLACKSTONE, *supra* note 11, at \*312-17; 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 244-50 (London, MacMillan 1883); Marion S. Kirk, "Jeopardy" During the Period of the Year Books, 82 U. PA. L. REV. 602, 605-09 (1934). By the fifteenth century, an acquittal on an indictment barred a prosecution by appeal for the same offense, and vice versa. BLACKSTONE, *supra* note 11, at \*335; FRIEDLAND, *supra* note 11, at 9; Kirk, *supra*, at 607-08 & nn. 25-26. At some point before 1487, a general practice developed in homicide cases in favor of appeals. An individual would not be tried on an indictment for homicide until more than a year and a day after the death of the deceased. BLACKSTONE, *supra* note 11, at \*335; HAWKINS, *supra*, at 334. A year and a day was the time period within which an appeal could be brought by those (the wife or the male heir of the deceased) entitled to prosecute an appeal of death. BLACKSTONE, *supra* note 11, at \*314-15; HAWKINS, *supra*, at 162-66. Frequently, however, witnesses died during this time period or the matter was forgotten. To remedy this situation, the statute enacted in 1487 provided for the immediate prosecution of an indictment for homicide, without waiting for the bringing of an appeal. In addition, it removed the plea of *autrefois acquit* as a bar to the prosecuting of an appeal for the same death. *See* BLACKSTONE, *supra* note 11, at \*335-36; STEPHEN, *supra*, at 248-49; Kirk, *supra*, at 608.

It has been argued that this statute shows that historically the finality accorded a judgment of acquittal has been subject to exceptions. Therefore interpreting the Double Jeopardy Clause to include an exception for an acquittal procured by a defendant through fraud would not be inconsistent with traditional double jeopardy principles. *People v. Aleman*, 1994 WL 684499, \*10 (Ill. Cir. Ct. Oct. 12, 1994) (interim ruling on motion to dismiss). The statutory exception, however, does not support this argument. The exception arose at a time before the power to prosecute for offenses had coalesced in the state and, hence, before the emergence of modern double jeopardy doctrine. By its very nature, the protection against double jeopardy constitutes a limitation upon the power of the state to prosecute and punish an individual. As one commentator put it, "The state's gathering of the power to institute suit is a prerequisite to a true double jeopardy situation . . . ." SIGLER, *supra* note 13, at 9. Therefore, the fact that a private individual could bring an appeal of death against a person following that person's acquittal on an indictment for the same homicide is not inconsistent with a rule barring the state from prosecuting an individual twice for the same offense. *Cf. United States v. Halper*, 490 U.S. 435, 451 (1989) ("The protections of the Double Jeopardy Clause are not triggered by litigation

#### IV. PROSECUTION FOR THE SAME OFFENSE FOLLOWING A FRAUDULENTLY-OBTAINED ACQUITTAL

##### A. Text Writers and Case Law

The Supreme Court frequently has stated that an acquittal *absolutely* or *unequivocally* bars a second trial for the same offense.<sup>56</sup> It has never held—nor even stated in dicta—that an exception to this rule exists when the acquittal resulted from fraud. Nevertheless, a number of text writers suggest that such an acquittal does not preclude a subsequent prosecution for the same offense.

Without elaborating, Blackstone stated that under the plea of *autrefois acquit* (a former acquittal)—an early form of protection against double jeopardy<sup>57</sup>—"when a man is fairly found not guilty upon any indictment, or other prosecution . . . he may plead such acquittal in bar of any subsequent accusation for the same crime."<sup>58</sup> This statement can be interpreted to mean

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between private parties."). In addition, the "loophole" created by the statute proved to be of little practical significance. *Bartkus v. Illinois*, 359 U.S. 121, 153 n.6 (1959) (Black, J., dissenting); see also FRIEDLAND, *supra* note 11, at 9 (noting that the statute "retarded the evolution of sound double jeopardy rules"). It was limited in scope, applying only to appeals for homicide, and it was construed extremely narrowly and never broadened. *HAWKINS*, *supra*, at 373-74, 377-79 (1721); FRIEDLAND, *supra* note 11, at 10; see also *Bartkus*, 359 U.S. at 153 n.6 (Black, J., dissenting); 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW \*462-63 (3d Am. ed. Springfield, G & C. Merriam 1836). Moreover, the statute soon fell into disuse. See *Bartkus*, 359 U.S. at 153 n.6 (Black, J., dissenting); see also STEPHEN, *supra*, at 249 (stating that the result of the trial on the indictment was "practically conclusive," unless it resulted in an acquittal "under circumstances which greatly dissatisfied the parties concerned"); FRIEDLAND, *supra* note 11, at 10 ("[B]ecause the use of the procedure of appeal was on the decline by this time, the dual procedure was probably not widely employed."). Although Parliament did not formally abolish prosecution by appeal until 1819, see 59 Geo. 3, ch. 46 (1819) (Eng.), by the early part of the eighteenth century—well before the adoption of the Double Jeopardy Clause—that method of prosecution was "all but practically obsolete," making the statutory exception essentially irrelevant. STEPHEN, *supra*, at 247; see also BLACKSTONE, *supra* note 11, at \*312 (stating that prosecution by appeal is "very little in use"); Kirk, *supra*, at 605 ("[T]he appeal became obsolete long before [1819]."); see generally HOLDSWORTH, *supra*, at 360-61.

56. See cases cited, *supra* note 35.

57. See *United States v. Scott*, 437 U.S. 82, 87 (1978) ("The constitutional provision had its origin in the three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon.").

58. BLACKSTONE, *supra* note 11, at \*335.

that an acquittal obtained through fraud, *i.e.*, *unfairly*,<sup>59</sup> does not bar a subsequent prosecution for the same offense.<sup>60</sup>

Writing early in the nineteenth century, Chitty, also discussing the plea of a former acquittal, asserted in his treatise on criminal law that "there is no exception"<sup>61</sup> to the rule that "where a man has once been pronounced 'not guilty,' on a valid indictment . . . he cannot afterwards be indicted again upon a charge of having committed the same supposed offence."<sup>62</sup> However, in discussing when a new trial can be granted *after verdict but before the entry of judgment*, he spoke directly to the issue of a fraudulently-obtained acquittal, saying: "[I]t seems to be the better opinion, that where the verdict [of acquittal] was obtained by the fraud of the defendant . . . as by keeping back the prosecutor's witnesses . . . a new trial may be granted."<sup>63</sup>

Relying in part on this latter assertion by Chitty, Bishop subsequently wrote in his treatise on criminal law: "[T]here is . . . direct English authority, and there are numerous judicial dicta, English and American, to the proposition that if the defendant's fraud at the hearing brings about his acquittal, the prosecutor may have a new trial."<sup>64</sup> Apparently disagreeing with Chitty, he continued: "Moreover, whether this view of the law is correct or not, [a] judgment of acquittal upon a verdict procured by fraud will not bar a second trial for the same offense."<sup>65</sup> *Corpus Juris Secundum* takes the same position, stating: "A verdict of acquittal procured by accused by fraud and collusion is a nullity and does not put him in jeopardy; and consequently it is no bar to a second trial for the same offense."<sup>66</sup>

For the most part, however, case law does not provide strong support for the assertions made by these authorities. Blackstone did not cite any cases in which a court held, or even stated in dicta, that an acquittal procured by fraud

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59. One definition of "fairly" is: "[I]n a just or lawful manner; without fraud . . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 814 (1986).

60. However, since "fairly" can be defined as "clearly, definitely, actually, [or] fully . . . ," *id.*, Blackstone's statement might do no more than restate the general principle that a verdict or finding of not guilty bars a subsequent prosecution for the same offense.

61. CHITTY, *supra* note 55, at \*452.

62. *Id.* (citing, *inter alia*, Blackstone).

63. *Id.* at \*657.

64. 1 JOEL P. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW § 1009 (8th ed. Chicago, T.H. Flood 1892).

65. *Id.*

66. 22 C.J.S. *Criminal Law* § 217 (1989); *see also* 17 THE AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW 593 (2d ed. 1900) ("A verdict of acquittal procured by a defendant by fraud is a nullity and does not put him in jeopardy, consequently it is no bar to a second trial for the same offense.").



does not bar a subsequent prosecution for the same offense. The lone case<sup>67</sup> cited by Bishop as "direct authority" for his statement that a prosecutor can obtain a new trial following an acquittal obtained through fraud may not have involved fraud at all.<sup>68</sup> The other cases Bishop cited to support his statement

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67. *Rex v. Furser*, Say. 90, 96 Eng. Rep. 813 (K.B. 1753).

68. The defendant in *Furser* removed his indictment from the court upon the condition that he be tried at the next assizes, and he had his clerk enter notice of trial in the court's office book. *Id.* Apparently the defendant appeared at the next assizes and was acquitted following a trial in which the prosecutor did not participate. The prosecutor then sought a new trial on the ground that he lacked notice of the first trial. In granting a new trial, the court rejected the defendant's claims that he was not required to give any notice of trial because of the obligation he undertook to be tried at the next assizes and that, if notice of trial were necessary, the entering of notice in the court's office book sufficed. *Id.* at 90-91. Nothing in the meager report of the case indicates that the defendant, in failing to give proper notice to the prosecutor, engaged in a deliberate deception. Indeed, Chitty seems to characterize this case as one involving the defendant's "neglecting to give due notice of trial," and an "irregularity in [the] proceedings," rather than as one involving "fraud of the defendant." CHITTY, *supra* note 55, at \*656 n.f & \*657 (emphasis added). *Furser* thus can be read as holding that a proceeding in which the prosecutor does not participate because of lack of notice does not constitute a "trial," and the prosecutor, upon motion, can obtain a new trial despite the defendant's "acquittal." See also *supra* note 34, discussing *People v. Deems*, 410 N.E.2d 8 (Ill. 1980), *cert. denied*, 450 U.S. 925 (1981), and its progeny.

In the same footnote in which he cited *Furser*, Bishop stated that "it has been held in Connecticut that in such cases [where the defendant's fraud at trial brings about his acquittal] a new trial will be granted the prosecutor on a penal statute." BISHOP, *supra* note 64, at § 1009 n.1. To support this statement he cited three cases involving actions brought by private individuals, not public prosecutors acting in behalf of the state. Two of the cases, however, support the statement only in dicta. *Hylliard v. Nickols*, 2 Root 176, 177 (Conn. Super. Ct. 1795) (granting "prosecutor" new trial on ground defendant obtained acquittal through forgery and perjury, and rejecting defendant's plea of former acquittal because action "not a criminal prosecution, but [rather] a civil action brought on a remedial statute . . ."; stating in dicta that "was [sic] it a criminal prosecution, an acquittal obtained by forgery and perjury, by the procurement of the prisoner, would be set aside in favor of the public"); *Hannaball v. Spalding*, 1 Root 86, 87 (Conn. Super. Ct. 1783) (reversing judgment against defendant in *qui tam* prosecution for theft, obtained after new trial granted "prosecutor" as to civil part *on ground of newly discovered evidence*, because new trial cannot be granted prosecutor in criminal case following defendant's acquittal, "unless the acquittal was procured by some fraud or malpractice," and new trial cannot be granted as to only one-half of *qui tam* action but not the other). The third case, in which the court rejected a plea of a former acquittal because the acquittal had been obtained by fraud, does not provide strong support for Bishop's statement because it apparently did not involve a criminal prosecution. *Pruden v. Northrup*, 1 Root 93, 94 (Conn. Super. Ct.

do so, as he admitted, only in dicta.<sup>69</sup> Chitty cited three cases to support his statement that a prosecutor can obtain a new trial if the defendant's acquittal resulted from his own fraud. One of those cases is the same case cited by Bishop that may not have involved fraud at all,<sup>70</sup> while the other two, also cited by Bishop, support the assertion only in dicta.<sup>71</sup> More importantly, Chitty acknowledged a case reaching the opposite result,<sup>72</sup> namely, that "if

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1784) (finding that trial judge did not err in granting new trial to "prosecutor" in action by private individual to condemn ship and cargo for violation of Embargo Laws because acquittal of vessel and cargo procured by "fraud and imposition, not only upon the libellant, but upon the law and upon the court . . .," in that principal witness for claimants at trial had undisclosed interest in vessel and cargo).

69. *Rex v. Bear*, 2 Salk. 646, 91 Eng. Rep. 547 (K.B. 1697) (denying prosecutor's motion for new trial on ground verdict of acquittal was against evidence and stating that new trial allowed where acquittal obtained by fraud or practice, such as stealing away witnesses); *Rex v. Davis*, 12 Mod. 8, 9, 88 Eng. Rep. 1129 (K.B. 1691) (denying prosecutor's motion for new trial on ground verdict of acquittal was against evidence and stating that in Hale's time new trial could be granted where acquittal obtained by fraud); *State v. Brown*, 16 Conn. 54, 58 (1843) (denying prosecutor's motion for new trial following defendant's acquittal and stating that "in all cases of indictments or informations for matters criminal, in which the accused has been acquitted, and his acquittal has not been procured by his own fraud or evil practice, he shall not again be put in jeopardy, by a new trial granted upon the motion of the state or the public prosecutor"); *State v. Jones*, 7 Ga. 422, 424 (Ga. 1849) (dismissing writ of error brought by prosecutor to review judgment quashing indictment before trial and stating that while general rule is that in criminal cases errors are not subject to revision at instance of government, "[a]n exception to this rule is stated to exist, when the acquittal [sic] of the defendant is effected through his fraud or misconduct"); *State v. Davis*, 4 Blackf. 345, 346 (Ind. 1837) (holding that even if trial court erred in refusing to allow prosecutor to enter *nolle prosequi* after trial commenced, acquitted defendant could not be placed in jeopardy again for same offense, because "the verdict and judgment of acquittal on an indictment, if fairly obtained, are conclusive"); *State v. Wright*, 7 S.C.L. (2 Tread.) 517, 519-20 (S.C. Ct. App. 1814) (denying prosecutor's motion for new trial on ground verdict of acquittal was against law and evidence and stating that "a new trial ought not to be granted, *after an acquittal in a criminal case*, unless the defendant has been guilty of unfair practice").

70. *Rex v. Furser*, Say. 90, 96 Eng. Rep. 813 (K.B. 1753), discussed *supra* note 68.

71. *Rex v. Bear*, 2 Salk. 646, 91 Eng. Rep. 547 (K.B. 1697); *Rex v. Davis*, 12 Mod. 8, 9, 88 Eng. Rep. 1129 (K.B. 1691). See *supra* notes 68 and 69 for complete discussion.

72. *The King v. Fenwick & Holt*, 1 Sid. 153, 82 Eng. Rep. 1027 (K.B. 1674) (declaring new trial not permissible following acquittal of defendants even though individual acting in interest of defendants prevented government witnesses from appearing at defendants' trial).

the acquittal in an indictment have [sic] been procured by a trick or fraud of the defendant, he may be punished for the trick or fraud; but . . . *the court cannot grant a new trial.*"<sup>73</sup>

*State v. Swepson*,<sup>74</sup> the only case cited by Bishop to support his claim that an acquittal procured by fraud will not bar a second trial for the same offense, involved a motion by the prosecutor requesting the state supreme court to order the trial court to determine whether the defendant procured his acquittal on a misdemeanor charge through fraud and, if it determined that he had, to retry him. The supreme court, citing its lack of jurisdiction over the matter, denied the prosecutor's motion.<sup>75</sup> Nevertheless, the court went on to say that the prosecutor could proceed against the defendant under the original indictment or, if the statute of limitations had not yet run, under a new indictment, allowing the jury to decide whether the initial acquittal resulted from the defendant's fraud, because "[c]ases of acquittal procured by fraud of the defendant form an exception to the general rule, that no one shall be twice put in jeopardy for the same offence."<sup>76</sup> As is evident, this statement, being unnecessary to the decision in the case, was merely dicta. Further weakening the support this case provides for Bishop's assertion is the court's acknowledgment that "[t]his exception [to general double jeopardy principles] does not apply to capital cases, and perhaps not to felonies in general."<sup>77</sup>

Similarly, in both cases cited by *Corpus Juris Secundum*, the statement that an acquittal obtained through fraud does not bar a subsequent prosecution for the same offense is merely dicta, as neither case involved an allegation by the government that the defendant's acquittal resulted from fraud.<sup>78</sup> In the

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CHITTY also cited *Rex v. Read*, 1 Lev. 9, 83 Eng. Rep. 271 (K.B. 1671), where the court held that following the acquittal of the defendant the King could not obtain a new trial on the ground that prosecution witnesses failed to appear at trial. The report of the case does not, however, indicate that the prosecutor claimed that the defendant or anyone else fraudulently procured the missing witnesses' absence.

73. 9 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 628 (Philadelphia, T & J.W. Johnson 1854) (emphasis added).

74. 79 N.C. 632 (N.C. 1878).

75. *Id.* at 639.

76. *Id.* at 641.

77. *Id.* Earlier in its opinion the court had stated:

It is asserted in many text books and dicta of Judges and supported by some decisions, that a verdict of acquittal on an indictment for a *misdemeanor* procured by the trick or fraud of the defendant, is a nullity, and may be treated as such; and the person acquitted by such means may be tried again for the offence of which he was acquitted.

*Id.* at 639-40.

78. *State v. Lee*, 30 A. 1110, 1111 (Conn. 1894) (holding that government could appeal acquittal and ordering new trial *on ground trial court erroneously excluded*

most recent of these cases, *State v. Howell*,<sup>79</sup> decided in 1951, the court held that the trial court in which the defendant previously had been acquitted of

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*evidence for prosecution* and stating: "Nor is [jeopardy] exhausted by an acquittal when the verdict has been obtained through the fraud of the accused."); *State v. Howell*, 66 S.E.2d 701, 706 (S.C. 1951) (discussed *infra* in text accompanying notes 80-81).

The result reached by the court in *Lee* would be impermissible today under the Double Jeopardy Clause. *Scott v. United States*, 437 U.S. 82, 91, 98 (1978) ("A judgment of acquittal . . . may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal. . . . [T]he fact that 'the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles' affects the accuracy of that determination, but it does not alter its essential character."); *United States v. Ball*, 163 U.S. 662, 671 (1896) ("The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the Constitution."); *see also Smalis v. Pennsylvania*, 476 U.S. 140, 144-45 & n.7 (1986) (granting of defendants' demurrer and dismissal of certain charges by trial judge, at the close of government's case, constituted acquittal and barred further trial proceedings on those charges, even if trial judge erroneously interpreted governing legal principles).

To support its assertion that an acquittal procured by the accused through collusion or fraud does not bar a subsequent prosecution for the same offense, THE AMERICAN AND ENGLISH LEGAL ENCYCLOPEDIA OF LAW, *supra* note 66, relied upon only one case not cited by either Chitty, Bishop, or *Corpus Juris Secundum*, and that case did not involve, nor did the court even discuss, a previous acquittal obtained through fraud. *See State v. Reed*, 26 Conn. 208 (Conn. 1857) (holding that trial court's instruction that defendants' prior conviction before justice of peace did not bar current prosecution for same offense if prosecutors in first trial fraudulently brought that action to screen defendants from trial in superior court was erroneous because it did not require complicity of defendants in fraud; stating that respectable authorities show that "if the conviction in question had been procured by the fraud and collusion of the defendants, . . . it would be void") (emphasis added). *The Encyclopedia* cited *Rex v. Fraser*, Say. 90, by which it presumably meant *Rex v. Furser*, Say. 90, 96 Eng. Rep. 813 (K.B. 1753). As previously indicated, that case may not in fact have involved fraud. *See supra* note 68. The other cases cited by *The Encyclopedia* support its assertion only in dicta. *See Rex v. Bear*, 2 Salk. 646, 91 Eng. Rep. 547 (K.B. 1697); *Rex v. Davis*, 12 Mod. 8, 9, 88 Eng. Rep. 1129 (K.B. 1691); *State v. Lee*, 30 A. 1110, 1111 (Conn. 1894); *State v. Brown*, 16 Conn. 54, 58 (Conn. 1843); *State v. Jones*, 7 Ga. 422, 424 (Ga. 1849); *State v. Davis*, 4 Blackf. 345, 346 (Ind. 1837); *State v. Wright*, 7 S.C.L. (2 Tread.) 517, 519-20 (S.C. Ct. App. 1814). For discussion of these cases *see generally supra* notes 68-69 and 78. *The Encyclopedia* additionally stated that in *State v. Swepson*, 79 N.C. 632 (N.C. 1878), *see supra* text accompanying notes 74-77, the court "says that the precedents for [the] doctrine [that a fraudulently-obtained acquittal does not bar a subsequent prosecution for the same offense] apply only to misdemeanors, and do not apply to capital offenses, and perhaps not to felonies."

79. 66 S.E.2d 701 (S.C. 1951).

murder had jurisdiction over the matter and that therefore the defendant's prior acquittal barred his subsequent prosecution for the same killing in another county.<sup>80</sup> Although totally unnecessary for its decision, the court quoted the assertion made in *Corpus Juris Secundum* that an acquittal procured by the defendant through fraud does not bar the government from again prosecuting him for the same offense; it then stated that the government did not claim that the defendant's acquittal resulted from collusion or fraud.<sup>81</sup> Fifteen years later, however, in *State v. Johnson*,<sup>82</sup> the same court rejected a defendant's motion to dismiss the government's appeal from a verdict of acquittal. In doing so, the court characterized its quotation from C.J.S. in *Howell* as a "holding" and concluded that, because the government contended that the defendant's acquittal resulted from fraud and collusion, it could consider the appeal on its merits.<sup>83</sup> Although *Johnson* ultimately held that the trial court did not abuse its discretion in finding no undue influence had been brought upon two jurors by people acting on behalf of the defendant and affirmed the denial of the government's motion for a new trial,<sup>84</sup> it is one of, at most, a handful of cases—and perhaps the only relatively *recent* case—in which an appellate court has actually held that an acquittal does not bar a second trial for the same offense if it resulted from collusion or fraud by the accused.

On the other hand, at least one American case supports the proposition that an acquittal procured through fraud *does* bar a subsequent prosecution for the same offense. In *Shideler v. State*,<sup>85</sup> the court held that the defendant's previous acquittal in a bench trial on an information charging him with bigamy precluded his subsequent prosecution on an indictment charging him with the same offense, even though the acquittal may have resulted from the bribery of the prosecutor by individuals acting in the interest of the accused.<sup>86</sup>

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80. *Id.* at 707-08.

81. *Id.* at 706.

82. 149 S.E.2d 348 (S.C. 1966).

83. *Id.* at 350.

84. *Id.* at 353.

85. 28 N.E. 537 (Ind. 1891).

86. *Id.* at 538 (stating that "[w]hatever rights the state has, must be marked out in the original proceeding."); *see also* *The King v. Fenwick & Holt*, 1 Sid. 153, 82 Eng. Rep. 1027 (K.B. 1674) (new trial not permissible following acquittal of defendants even though individual acting in interest of defendants prevented government witnesses from appearing at defendants' trial).

In *Shideler*, the government alleged that the prosecutor, after receiving the bribe money, failed to subpoena or otherwise notify the government witnesses of the time of trial and, when trial commenced, failed to introduce any evidence. Language in the court's opinion, however, indicates that it may have reached a different result had the trial judge been the one bribed. The court stated:

Numerous cases<sup>87</sup> have held that a *conviction* "procured fraudulently or by collusion of the offender for the purpose of protecting himself from further prosecution and adequate punishment . . . is no bar to a subsequent prosecution for the same offense."<sup>88</sup> These cases typically have involved a defendant who received a light sentence after being convicted of a relatively minor offense—often upon a plea of guilty—before a justice of the peace at a proceeding conducted without the presence and participation of the public prosecutor. The defendants in these cases later raised their conviction as a bar to a subsequent prosecution in a superior court for the same or a greater-

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In the first prosecution the court had jurisdiction both of the subject-matter and of the parties. . . . [T]he proceedings were regular up to and including the submission, and are not void. The steps taken were the usual, proper, and necessary steps in such a case, except that the defendant had the right to a jury trial, instead of a trial by the court. *It is not pretended, however, that the judge was corrupt, or that his action was not characterized throughout by the highest and purest motives, and most sincere devotion to duty.*

28 N.E. at 538 (emphasis added).

87. *E.g.*, *Richards v. State*, 157 S.W. 141, 142 (Ark. 1913); *Edwards v. Commonwealth*, 25 S.W.2d 746, 747-48 (Ky. 1930); *State v. Simpson*, 9 N.W. 78 (Minn. 1881); *Smith v. State*, 69 So. 2d 837, 838-39 (Miss. 1954); *State v. Dockery*, 89 S.E. 36, 36-37 (N.C. 1916); *State v. Smith*, 43 S.E.2d 802, 803 (W. Va. 1947); *McFarland v. State*, 32 N.W. 226, 227 (Wis. 1887).

In addition, many cases have stated the rule in dicta. *E.g.*, *Coumas v. Superior Court*, 192 P.2d 449, 451 (Cal. 1948) (involving statutory provision); *Hampton v. Municipal Court*, 51 Cal. Rptr. 760, 763 (Cal. Ct. App. 1966); *Shideler v. State*, 28 N.E. 537 (Ind. 1891); *Teague v. Commonwealth*, 189 S.W. 908, 910 (Ky. 1916); *State v. Bell*, 260 A.2d 849, 854 (N.J. 1970); *People ex rel. Leventhal on Behalf of Agosto v. Warden*, 477 N.Y.S.2d 332, 335 (N.Y. App. Div. 1984); *State v. Nardone*, 334 A.2d 208, 210-11 (R.I. 1975); *Benard v. State*, 481 S.W.2d 427, 430 (Tex. Crim. App. 1972); *Rivera v. State*, 716 S.W.2d 68, 73 (Tex. Ct. App. 1986).

88. C.J.S., *supra* note 66, at § 217; *see also* 21 AM. JUR. 2D *Criminal Law* § 257 (1981) ("[A] plea of former jeopardy is not supported by a sham or collusive proceeding under which the defendant pleads guilty to a minor offense in order to avoid an anticipated prosecution on a more serious charge based on the same facts."); BISHOP, *supra* note 64, at § 1010 ("If one procures himself to be prosecuted for an offence which he has committed, thinking to get off with a slight punishment and to bar a real prosecution in the future,—if the prosecution is really managed by himself, either directly or through the agency of another,—he is, while thus holding his fate in his own hand, in no jeopardy."); MODEL PENAL CODE § 1.11 (Official Draft 1962) ("A prosecution is not a bar [to a subsequent prosecution] under any of the following circumstances: . . . (2) The former prosecution was procured by the defendant without the knowledge of the appropriate prosecuting officer and with the purpose of avoiding the sentence that might otherwise be imposed . . .").

inclusive offense based upon the same facts.<sup>89</sup> Although the courts, in rejecting the defendants' claims, relied upon the fraud practiced by the defendants, "a better reason for such decisions is that the state . . . never [became] a party to the action [and] [t]he state can no more be bound by a judgment to which it is not a party than can a citizen of the state."<sup>90</sup> This latter reasoning of course does not apply when the government participates fully and actively in a trial that results in the defendant's acquittal, even if that acquittal resulted from fraud.

Moreover, even putting aside the alternative explanation for the result reached in those cases involving a fraudulently-obtained *conviction*, those

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89. *E.g.*, *Richards*, 157 S.W. at 142 (after learning that an individual would report him to grand jury, defendant went to justice of peace, pleaded guilty, and was fined \$10; no session of court was held, no affidavits were filed, and neither defendant nor his witnesses were sworn); *Edwards*, 25 S.W.2d at 748 (defendant went with two of his witnesses to magistrate who issued warrant upon defendant's own affidavit and then immediately tried defendant for assault, without notifying county attorney or victim; after hearing testimony of defendant and his two witnesses, magistrate convicted defendant and imposed \$1 fine); *Simpson*, 9 N.W. at 78 (defendant went to justice of peace and filed complaint against himself for assault and battery; immediately thereafter, without prosecutor or victim present, defendant testified under oath to fact and character of assault and battery, pleaded guilty, and was fined \$6); *Smith*, 69 So. at 838-39 (after sheriff found quantity of whiskey during search of defendant's premises, defendant's first cousin filed affidavit with justice of peace charging defendant with unlawful possession of intoxicating liquors on same day and same hour as sheriff's search; defendant then pleaded guilty at proceeding where no testimony taken and prosecutor not present, and justice of peace imposed minimum sentence of \$100 fine); *Dockery*, 89 S.E. at 36-37 (at instance of defendant's father, defendant's uncle approached justice of peace to "fix the matter" so defendant would not have to appear in superior court for an affray with another; justice of peace issued warrant upon affidavit of defendant's uncle and, without examining any witnesses except for defendant's uncle, convicted defendant and fined him \$2.50); *Smith*, 43 S.E.2d at 803 (immediately following assault, codefendant filed complaint against defendant before justice of peace; without either prosecutor or victim present, defendant confessed to assault and battery and was fined \$5); *McFarland*, 32 N.W. at 227 (after town's board of supervisors's chairman filed complaint against defendant for selling liquor without license, another individual, acting at request of defendant's attorney, went before a justice and filed complaint against defendant for same offense; defendant then pleaded guilty to charge in latter complaint and was fined \$10).

90. *State v. Bartlett*, 164 N.W. 757, 758 (Iowa 1917); *accord Shideler*, 28 N.E. at 537-38; *see also* BISHOP, *supra* note 64, at § 1010 ("The plaintiff State is no party in fact, but only in name; the judge indeed is imposed upon, yet in point of law adjudicates nothing; 'all was a mere puppet-show, and every wire moved by the offender himself.' The judgment therefore is a nullity, and is no bar to a real prosecution.").

cases still do not support the contention that a fraudulently-obtained *acquittal* does not bar a subsequent prosecution for the same offense, for a conviction has never been accorded the same finality as an acquittal. For example, under most circumstances,<sup>91</sup> the government can retry a person who succeeds in having her conviction set aside on direct appeal,<sup>92</sup> collateral attack,<sup>93</sup> or a postverdict motion for a new trial.<sup>94</sup> Likewise, although a person ordinarily cannot be tried for an offense after being convicted of a lesser-included offense,<sup>95</sup> exceptions to this general rule allow such a prosecution "where the State [was] unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge [had] not occurred or [had] not been discovered despite the exercise of due diligence";<sup>96</sup> where the defendant "elect[ed] to have the two offenses tried separately and persuade[d] the trial court to honor [her] election";<sup>97</sup> where, over the prosecutor's

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91. *But see* *Burks v. United States*, 437 U.S. 1, 17-18 (1978) (holding that the government cannot retry defendant where conviction reversed because of insufficiency of evidence).

92. *United States v. Ball*, 163 U.S. 662, 672 (1896); *accord* *Montana v. Hall*, 481 U.S. 400, 402-04 (1987) (per curiam); *Tibbs v. Florida*, 457 U.S. 31, 40-45 (1982); *Forman v. United States*, 361 U.S. 416, 425-26 (1960); *Stroud v. United States*, 251 U.S. 15, 18 (1919).

93. *Lockhart v. Nelson*, 488 U.S. 33, 38 (1988); *United States v. Tateo*, 377 U.S. 463, 465-66 (1971).

94. *United States v. Gutierrez-Zamarano*, 23 F.3d 235, 237-38 (9th Cir. 1994); *United States v. Alegria*, 980 F.2d 830, 834 (2d Cir. 1992); *United States v. Arache*, 946 F.2d 129, 139-40 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1507 (1992); *People v. Brown*, 584 N.E.2d 355, 360-62 (Ill. App. Ct. 1991); *Lofton v. State*, 777 S.W.2d 96, 97 (Tex. Crim. App. 1989).

Under a two-tier system of trial courts for minor offenses, a defendant convicted in the first tier can, at her election, be tried de novo in the second tier without violating the Double Jeopardy Clause. *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 304-05 (1984); *Ludwig v. Massachusetts*, 427 U.S. 618, 631-32 (1976).

95. *Brown v. Ohio*, 432 U.S. 161, 168-69 (1977) (defendant could not be prosecuted for "auto theft" after already having been convicted of lesser-included offense of "joyriding").

96. *Id.* at 169 n.7; *accord* *Illinois v. Vitale*, 447 U.S. 410, 420 n.8 (1980); *Jeffers v. United States*, 432 U.S. 137, 151-52 (1977) (plurality opinion); *e.g.*, *Garrett v. United States*, 471 U.S. 773, 790-93 (1985) (even if offense of importing marijuana in Washington was lesser-included offense of Continuing Criminal Enterprise charge brought in Florida, plea of guilty to former did not bar subsequent prosecution for latter, because latter offense had not been completed at time defendant indicted in Washington); *Diaz v. United States*, 223 U.S. 442, 448-49 (1912) (prosecution for homicide not barred by previous conviction for assault and battery, because victim died after assault and battery trial).

97. *Jeffers*, 432 U.S. at 152 (plurality opinion) (declaring that prosecution for



objection, the defendant pleaded guilty to the lesser-included offense in a proceeding in which she was charged with both the greater and lesser-included offenses;<sup>98</sup> or where the defendant breached a plea agreement pursuant to which she pleaded guilty to the lesser-included offense in exchange for the dismissal of the greater charge.<sup>99</sup>

It appears well settled that the Double Jeopardy Clause does not bar a subsequent prosecution following a *mistrial* declared because of fraud, such as where the defendant knowingly presented perjured testimony,<sup>100</sup> fraudulently managed to have a friend impaneled on the jury,<sup>101</sup> or tampered with a juror,<sup>102</sup> or where a juror misrepresented during voir dire examination her relationship to the accused.<sup>103</sup> Despite some language in a few cases

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engaging in continuing criminal enterprise not barred by previous conviction for lesser-included offense of conspiracy to distribute narcotics, because defendant opposed government's efforts to try offenses together).

98. *Ohio v. Johnson*, 467 U.S. 493, 501-02 (1984) (holding that continued prosecution of defendant for murder and aggravated robbery not barred by defendant's guilty plea, over government's objection, to lesser-included offenses of involuntary manslaughter and grand theft).

99. *Ricketts v. Adamson*, 483 U.S. 1, 9-10 (1987) (at least where plea agreement provided that original charges could be reinstated if defendant did not fulfill obligations under agreement) (prosecution for first-degree murder not barred by previous conviction for second-degree murder where defendant breached plea bargain pursuant to which he pleaded guilty to second-degree murder in exchange for dismissal of first-degree murder charge).

100. *State v. Reid*, 479 N.W.2d 572, 574-76 (Wis. Ct. App. 1991) (resulting when defense witness who presented exculpatory testimony also testified she did not know defendant and was not related to him when in fact she was his sister).

101. *State v. Bell*, 81 N.C. 591, 593-95 (N.C. 1879) (resulting when acquaintance of defendant who previously had been assisting defendant in his defense impaneled after falsely swearing he had not formed opinion that defendant was not guilty).

102. *United States v. Armco Steel Corp.*, 252 F. Supp. 364, 371 (S.D. Cal. 1966) (dictum); *United States v. Whitlow*, 110 F. Supp. 871, 876 (D.D.C. 1953) (dictum); *Lewis v. State*, 452 P.2d 892, 897 (Alaska 1969) (dictum); *State v. Cutshall*, 180 S.E.2d 745, 752-53 (N.C. 1971) (defendant met with juror during recess in deliberations); *Bell*, 81 N.C. at 594 (dictum); *Plunkett v. State*, 883 S.W.2d 349, 354-55 (Tex. Ct. App. 1994) (unauthorized individuals acting on behalf of defendant may have paid one or more jurors to guarantee hung jury); *see also State ex rel. Larkins v. Lewis*, 54 So. 2d 199, 201 (Fla. 1951) (several individuals attempted to communicate with jurors during deliberations).

103. *Armco Steel Corp.*, 252 F. Supp. at 371 (dictum); *In re Ascher*, 90 N.W. 418, 419, 423 (Mich. 1902) (juror had stated he knew only one member of defendant's family when in fact he had had business dealings with another, defendant's brother, over considerable period of time and owed him small sum of money); *Helton v. State*, 255 S.W.2d 694, 698-99 (Tenn. 1953) (juror had stated he merely knew defendant

indicating a different rationale,<sup>104</sup> the reason the government can retry a defendant in such situations is that the Double Jeopardy Clause does not bar a retrial following a mistrial declared over the defendant's objection<sup>105</sup> where a "manifest necessity" existed for termination of the trial before verdict,<sup>106</sup> and the discovery during trial that the defendant or a juror engaged in fraudulent conduct with respect to the trial constitutes such a "manifest necessity."<sup>107</sup>

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when in fact he had had many contacts with him), *cert. denied*, 346 U.S. 816 (1953); *see also* *United States v. Simmons*, 142 U.S. 148, 154-55 (1891) (jurors learned of allegation that during voir dire examination one of their number had falsely sworn he was not acquainted with defendant).

104. *E.g.*, *Armco Steel Corp.*, 252 F. Supp. at 370 ("*Jeopardy does not attach* when a jury has been sworn if there exists urgent circumstances or an emergency which by diligence and care could not have been averted, and, when it appears that a free and fair trial cannot be had, the court may discharge the jury even over the objection of the accused.") (emphasis added); *Bell*, 81 N.C. at 594 ("Fraud vitiates every transaction into which it enters; and whenever it is of such a character and extent as necessarily to prevent a valid conviction, *there is no jeopardy*, and the prisoner may be held for another trial. In this case the prisoner had every assurance of an acquittal if the trial had proceeded to a verdict. His friend in his anxiety to serve him and save his life, had through fraud and perjury wormed himself into the jury for the express purpose of acquitting him. His life was not in danger. *There was no jeopardy.*").

As indicated *infra* text accompanying notes 128-36, a defendant is placed in jeopardy in a jury trial when the jury is empaneled and sworn, *Crist v. Bretz*, 437 U.S. 28, 35 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977), and in a bench trial when the judge begins to hear evidence, *Lee v. United States*, 432 U.S. 23, 27 n.3 (1977); *Martin Linen Supply Co.*, 430 U.S. at 569, regardless of what subsequent events may reveal. Indeed, before stating that the defendant had never been in jeopardy because of the presence of a friend of his on the jury, the court in *Bell* indicated that the true reason the defendant could be retried was that *the necessity of doing justice* compelled the trial judge to discharge the jury and declare a mistrial. *Bell*, 81 N.C. at 593-94.

105. Where a court declares a mistrial at the defendant's request or with her consent, the double jeopardy provision does not bar a retrial, *Oregon v. Kennedy*, 456 U.S. 667, 673, 675-76 (1982); *United States v. Dinitz*, 424 U.S. 600, 607-09 (1976), unless the government "goaded" the defendant into moving for the mistrial. *Kennedy*, 456 U.S. at 676.

106. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824); *accord Kennedy*, 456 U.S. at 672; *Arizona v. Washington*, 434 U.S. 497, 505 & n.18 (1978); *Illinois v. Somerville*, 410 U.S. 458, 461 (1973); *Wade v. Hunter*, 336 U.S. 684, 689-90 (1949); *Simmons v. United States*, 142 U.S. 148, 154 (1891).

107. *State v. Cutshall*, 180 S.E.2d 745, 752-53 (N.C. 1971) (defendant met with juror during recess in deliberations); *Plunkett v. State*, 883 S.W.2d 349, 354-55 (Tex. Ct. App. 1994) (unauthorized individuals acting on behalf of defendant may have paid one or more jurors to guarantee hung jury); *State v. Reid*, 479 N.W.2d 572, 574-76

Cases allowing the government to re prosecute the defendant following a *mistrial* declared because of fraud do not, however, support the contention that the same result should follow an *acquittal* obtained through fraud. The Supreme Court recognized the distinction between the two situations in *Arizona v. Washington*,<sup>108</sup> when it stated: "*Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused.*"<sup>109</sup>

An analysis of the policies underlying the protection against double jeopardy shows why the two situations are treated differently. Where the defendant's first trial resulted in a mistrial, the defendant has an interest—protected by the Double Jeopardy Clause—in not having to defend herself a second time for the same offense.<sup>110</sup> But she has no interest in preserving the finality of the judgment, because her trial was never completed and consequently no judgment was ever rendered in her trial. And while she has an interest—once again protected by the Double Jeopardy Clause—in "being able, once and for all, to conclude [her] confrontation with society through the verdict of a tribunal [she] might believe to be favorably disposed to [her] fate,"<sup>111</sup> that interest long has been balanced against the public's

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(Wis. Ct. App. 1991), *cert. denied*, 485 N.W.2d 413 (Wis. 1992) (defense witness testified she did not know defendant and was not related to him when in fact she was his sister); *see also* *Simmons v. United States*, 142 U.S. 148, 154 (1891) (jurors learned of allegation that during voir dire examination one of them had falsely sworn he was not acquainted with defendant); *State ex. rel. Larkins v. Lewis*, 54 So. 2d 199, 201 (Fla. 1951) (several individuals attempted to communicate with jurors during deliberations); *Bell*, 81 N.C. at 593-94 (acquaintance of defendant who previously had been assisting defendant in his defense was impaneled after falsely swearing that he had not formed and expressed an opinion that defendant was not guilty).

108. 434 U.S. 497 (1978).

109. *Id.* at 505 (emphasis added); *see also* *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824) ("We are of opinion, that the [declaration of a mistrial because of a hung jury] constitute[s] no legal bar to a future trial. *The prisoner has not been convicted or acquitted*, and may again be put upon his defence.") (emphasis added).

110. As the Supreme Court explained in *Washington*:

Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which [she] is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted.

434 U.S. at 503-04 (footnotes omitted).

111. *Id.* at 514 (quoting *United States v. Jorn*, 400 U.S. 470, 486 (1971) (plurality opinion)).

interest in affording the prosecutor an opportunity to complete one trial against the accused, with the result that the defendant's "valued right to have [her] trial completed by a particular tribunal"<sup>112</sup> must bow to the government's interest if a "manifest necessity" exists for a mistrial.<sup>113</sup>

On the other hand, where the defendant's first trial was completed and resulted in a judgment of acquittal, the defendant has not only an interest in not having to defend herself a second time for the same offense,<sup>114</sup> but also an interest in preserving the "finality"<sup>115</sup> or "integrity"<sup>116</sup> of the

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112. *Wade v. Hunter*, 336 U.S. 684, 689 (1949), *reh'g denied* 337 U.S. 921 (1949); *accord* *Richardson v. United States*, 468 U.S. 317, 325 (1984); *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980); *Swisher v. Brady*, 438 U.S. 204, 215 (1978); *United States v. Scott*, 437 U.S. 82, 100-01 (1978); *Crist v. Bretz*, 437 U.S. 28, 33 (1978); *Washington*, 434 U.S. at 503, 505; *United States v. Dinitz*, 424 U.S. 600, 606 (1976); *Jorn*, 400 U.S. at 484 (plurality opinion).

113. The Supreme Court explained in *Wade*:

The double-jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal [she] is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy provision is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible . . . . In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. And there have been instances where a trial judge has discovered facts during a trial which indicated that one or more members of a jury might be biased against the Government or the defendant. It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial. What has been said is enough to show that a defendant's valued right to have [her] trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

336 U.S. at 688-69 (footnote omitted); *accord* *Illinois v. Somerville*, 410 U.S. 458, 470 (1973); *see also* *Washington*, 434 U.S. at 505 ("[A defendant's] valued right to have the trial concluded by a particular tribunal is sometimes subordinated to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury."); *Downum v. United States*, 372 U.S. 734, 736 (1963) ("At times the valued right of a defendant to have [her] trial completed by the particular tribunal summoned to sit in judgment on [her] may be subordinated to the public interest—when there is an imperious necessity to do so.").

114. *See supra* text accompanying notes 25-28, 42-45.

115. *Crist*, 437 U.S. at 32.

116. *Scott*, 437 U.S. at 92.

judgment.<sup>117</sup> The latter interest is much greater than the defendant's interest in finishing her trial before the initial tribunal, having been described by the Supreme Court on at least one occasion as "the primary purpose of the Double Jeopardy Clause,"<sup>118</sup> and, in the context of an acquittal, has never been weighed against the public's interest in retrying the accused.<sup>119</sup> Thus, in *Arizona v. Washington*,<sup>120</sup> the Supreme Court stated:

The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. *The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation."* If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair.<sup>121</sup>

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117. See also *United States v. DiFrancesco*, 449 U.S. 117, 128 (1980).

118. *Scott*, 437 U.S. at 92; see also *Crist*, 437 U.S. at 32 ("A primary purpose [of the guarantee against double jeopardy] is . . . to preserve the finality of judgments."); *DiFrancesco*, 449 U.S. at 128 ("It has been said that 'a' or 'the' 'primary purpose' of the Clause [is] 'to preserve the finality of judgments' or the 'integrity' of judgments.").

119. But see *United States v. Tateo*, 377 U.S. 463 (1971), where the Supreme Court, in articulating the rationale for allowing the government to retry a defendant who succeeds in having her conviction set aside on appeal or collateral attack, stated:

While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the . . . principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after [she] has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interests.

*Id.* at 466; accord *Lockhart v. Nelson*, 488 U.S. 33, 38-39 (1988); *Montana v. Hall*, 481 U.S. 400, 402-03 (1987) (per curiam); *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 308 (1984); *North Carolina v. Pearce*, 395 U.S. 711, 721 n.18 (1969).

120. 434 U.S. 497 (1978).

121. *Id.* at 503 (citation omitted) (emphasis added).

*B. Theoretical Basis and Policy Considerations for an Exception to Normal Double Jeopardy Principles*

Given the weak support in the case law for the existence of an exception to general double jeopardy principles for an acquittal resulting from fraud, and the absence of *any* indication by the Supreme Court that such an exception exists, the question whether the Double Jeopardy Clause bars a subsequent prosecution following a fraudulently-obtained acquittal for the same offense should be determined by examining the theoretical basis for such an exception to normal double jeopardy principles and by analyzing the effects of such an exception on the underlying purposes of the Double Jeopardy Clause. Before doing that, however, the scope of the contemplated exception should be defined.

1. Scope of the Contemplated Exception

The question raised by the 1993 indictment of Harry Aleman is whether the double jeopardy rule barring reprosecution for the same offense following an acquittal applies when the acquittal resulted from fraud, such as the bribery, blackmail, or intimidation<sup>122</sup> of the factfinder, the prosecutor, or a witness. Although the *Aleman* case raises the issue only in the context of a judge in a bench trial fraudulently acquitting the defendant, no rational basis exists for distinguishing between that situation and one in which a jury verdict of not guilty resulted from the bribery, blackmail, or intimidation of one or more jurors,<sup>123</sup> or from a friend or relative of the defendant "worming"<sup>124</sup> his

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122. The intimidation might involve a threat to harm either the individual himself or a member of his family. Indeed, there is speculation that the judge in Harry Aleman's first trial had been told that one of his children would be killed if he did not accept the bribe money and acquit Aleman. Mike Royko, *Aleman is Deserving of Even More Justice*, CHI. TRIB., Dec. 10, 1993, § 1, at 3.

123. See *State v. Cutshall*, 180 S.E.2d 745, 752 (N.C. 1971) (defendant met with juror during recess in deliberations); *Plunkett v. State*, 883 S.W.2d 349, 352-53 (Tex. Ct. App. 1994) (unauthorized individuals acting on behalf of defendant may have paid one or more jurors to find defendant not guilty); see also *State ex rel. Larkins v. Lewis*, 54 So. 2d 199, 201 (Fla. 1951) (several individuals attempted to communicate with jurors during deliberations).

Because a defendant can be acquitted in a jury trial only when all the jurors or, in some states, a substantial majority of the jurors, agree upon a verdict of not guilty, a defendant attempting to fraudulently obtain a not guilty verdict in a jury trial probably would have to bribe or otherwise improperly influence a substantial number of jurors, if not all of them. Fraudulently inducing only one or two jurors to vote in her favor might merely result in a hung jury, in which case the defendant normally could be retried. See *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824);

way onto the jury by concealing or misrepresenting his relationship to the accused.<sup>125</sup> In each of these situations, improper influence or fraud led the factfinder to acquit a defendant whom it might otherwise have convicted had it based its decision solely upon the evidence presented at trial. Similarly, there seems to be little difference between, on the one hand, an acquittal rendered by a dishonest, blackmailed, or intimidated factfinder after hearing the truthful testimony of witnesses, and, on the other hand, an acquittal

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*accord* Richardson v. United States, 468 U.S. 317, 323-24 (1984); United States v. Sanford, 429 U.S. 14, 16 (1976); Keerl v. Montana, 213 U.S. 135, 137-38 (1909). For instances where an acquittal requires all jurors to find defendant not guilty, *see, e.g.*, FED. R. CRIM. P. 31(a); COLO. REV. STAT. § 16-10-108 (1986); 725 ILL. COMP. STAT. § 5/115-4(o) (1992); MICH. R. CRIM. P. 6.410(B); PA. R. CRIM. P. 1120(b); *see* Apodaca v. Oregon, 406 U.S. 404, 414 (1972) (Stewart, Brennan, & Marshall, JJ., dissenting) (Sixth Amendment requires unanimous verdict in all criminal prosecutions); *id.* at 388 (Douglas, Brennan, & Marshall, JJ., dissenting) (same); *id.* at 371 (Powell, J., concurring in the judgment) (Sixth Amendment requires unanimous verdict in federal criminal prosecutions); Burch v. Louisiana, 441 U.S. 130, 138 (1979) (Sixth Amendment requires unanimous verdict when six-person jury used in state criminal trial for nonpetty offense). For instances where a substantial majority of jurors can acquit a defendant, *see e.g.*, LA. CODE CRIM. PROC. ANN. art. 782 (West 1981) ("Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict."); OR. REV. STAT. ANN. § 136.450 (1990) ("Except as otherwise provided, the verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors except in a verdict for murder which shall be unanimous."); *see Apodaca*, 406 U.S. at 406, 411-14 (plurality opinion) (holding that Sixth Amendment does not prohibit less-than-unanimous verdicts in criminal prosecutions and therefore state court convictions based upon 11-1 and 10-2 verdicts can stand); *id.* at 376-77 (Powell, J., concurring in the judgment) (holding that Sixth Amendment, as applied to states through Fourteenth Amendment, does not prohibit less-than-unanimous verdicts in state criminal prosecutions and therefore state court convictions based upon 11-1 and 10-2 verdicts can stand); Johnson v. Louisiana, 406 U.S. 356, 363 (1972) (guilty verdict based upon 9-3 vote satisfies constitutional requirement that guilt be proved beyond a reasonable doubt and therefore does not deny a defendant due process of law).

124. State v. Bell, 81 N.C. 591, 594 (1879).

125. *See* United States v. Simmons, 142 U.S. 148, 148-49 (1891) (juror may have falsely sworn he was not acquainted with defendant); *Bell*, 81 N.C. at 592-93 (acquaintance of defendant who previously had been assisting defendant in his defense was impaneled after falsely swearing he had not formed opinion that defendant was not guilty); Helton v. State, 255 S.W.2d 694, 697-98 (Tenn. 1953) (person who was "very friendly" with defendant was impaneled after falsely testifying he merely knew defendant), *cert. denied*, 346 U.S. 816 (1953); *see also In re Ascher*, 90 N.W. 418, 419 (Mich. 1902) (person who had had business dealings with defendant's brother over considerable period of time and who owed him small sum of money was impaneled after falsely testifying he did not know him).

rendered by an honest and noncoerced factfinder based upon an intentionally weak case presented by a bribed, blackmailed, or intimidated prosecutor<sup>126</sup> or upon the false testimony of one or more witnesses who were bribed, blackmailed, or intimidated into committing perjury.<sup>127</sup>

Somewhat further removed from these situations is that in which an honest and noncoerced factfinder acquitted a defendant on the basis of the truthful testimony of witnesses at a trial at which an individual with information implicating the defendant in the crime charged was killed or improperly influenced to leave the jurisdiction or otherwise not appear to testify at the defendant's trial.<sup>128</sup> Here, unlike the other situations, no fraud occurred in the judicial proceeding itself. Because of the absence of such fraud, this situation may differ enough from the others so that any exception to normal double jeopardy principles for a fraudulently-obtained acquittal would not be broad enough to encompass it. That is, any exception to normal double jeopardy principles may apply only to situations in which the acquittal resulted from fraud occurring in the judicial proceeding itself. On the other hand, an acquittal based upon the fraudulently-procured absence of a witness is still an acquittal resulting from fraud, and there does not appear to be any principled basis for distinguishing among types of fraud when creating an exception to normal double jeopardy principles.<sup>129</sup>

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126. *See Shideler v. State*, 28 N.E. 537 (Ind. 1891) (government alleged that prosecutor, after receiving bribe money, failed to subpoena or otherwise notify government witnesses of time of trial and, when trial commenced, failed to introduce any evidence).

127. *See State v. Reid*, 479 N.W.2d 572 (Wis. Ct. App. 1991) (defense witness who presented exculpatory testimony also testified she did not know defendant and was not related to him when in fact she was his sister); *see also Hylliard v. Nickols*, 2 Root 176, 177 (Conn. Super. Ct. 1795) (stating in dicta that "an acquittal obtained by forgery and perjury, by the procurement of the prisoner, would be set aside in favor of the public"); *Pruden v. Northrup*, 1 Root 93, 94 (Conn. Super. Ct. 1784) (upholding granting of new trial to "prosecutor" because acquittal of vessel and cargo procured by "fraud and imposition," in that principal witness for claimants at trial had undisclosed interest in vessel and cargo in action by private individual to condemn ship and cargo for violation of Embargo Laws).

128. *See The King v. Fenwick & Holt*, 1 Sid. 153, 82 Eng. Rep. 1027 (K.B. 1674) (holding that acquittal barred subsequent prosecution for same offense even though the individual acting in interest of defendants prevented government witnesses from appearing at defendants' trial); *Rex v. Bear*, 2 Salk. 646, 91 Eng. Rep. 547 (K.B. 1697) (stating in dicta that new trial allowed where acquittal obtained by fraud or practice, such as stealing away witnesses).

129. *See Bear*, 2 Salk. 646, 91 Eng. Rep. 547 (stating in dicta that new trial allowed where acquittal obtained by fraud or practice, such as stealing away witnesses).



## 2. Theoretical Basis for the Contemplated Exception

In refusing to dismiss the indictment of Harry Aleman for a murder for which he already had been tried and acquitted by a judge, the trial court concluded that Aleman had never been in "jeopardy" at his first trial because the judge had been paid a bribe to find Aleman not guilty.<sup>130</sup> It is true that the Double Jeopardy Clause does not bar a second trial of a defendant for a particular offense if she were not in jeopardy at her first trial for that offense.<sup>131</sup> For "an accused must suffer jeopardy before [she] can suffer double jeopardy."<sup>132</sup> However, the claim that a defendant whose previous acquittal resulted from fraud was not in jeopardy at her first trial cannot withstand analysis.

"Jeopardy," as that term is used in the Fifth Amendment, "entails the 'potential or risk of trial and conviction' . . . ."<sup>133</sup> Jeopardy attaches once a defendant is "put to trial before the trier of facts"<sup>134</sup> in a court "having

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130. *People v. Aleman*, 1994 WL 684499, \*9 and \*10 (Ill.Cir. Oct. 12, 1994) (interim ruling on defendant's motion to dismiss indictments).

131. *Serfass v. United States*, 420 U.S. 377, 388-94 (1975).

Indeed, under certain circumstances the Double Jeopardy Clause does not bar a second trial for the same offense even though the defendant *was* in jeopardy at her first trial. *E.g.*, *Oregon v. Kennedy*, 456 U.S. 667, 673, 675-76 (1982) (mistrial declared at defendant's request); *United States v. Scott*, 437 U.S. 82, 98-101 (1978) (charges erroneously dismissed on motion of defendant); *Arizona v. Washington*, 434 U.S. 497, 512-16 (1978) (mistrial declared because of possible juror bias); *United States v. Dinitz*, 424 U.S. 600, 607-09 (1976) (mistrial declared at defendant's request); *Illinois v. Somerville*, 410 U.S. 458, 468-69, 471 (1973) (mistrial declared because of fatally deficient, incurable indictment); *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824) (mistrial declared because of deadlocked jury); *see generally* RUDSTEIN ET AL., *supra* note 8, at ¶ 11.01[3][h]-[i] (1991 & 1993).

132. *Serfass*, 420 U.S. at 393.

133. *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 310 (1984) (quoting *Price v. Georgia*, 398 U.S. 323, 329 (1970)); *see also* *Breed v. Jones*, 421 U.S. 519, 528 (1975) ("Jeopardy denotes risk. In the constitutional sense, jeopardy describes the risk that is traditionally associated with a criminal prosecution."); *Serfass*, 420 U.S. at 391 ("Without risk of determination of guilt, jeopardy does not attach . . .").

134. *Serfass*, 420 U.S. at 388 (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion)).

In a jury trial, jeopardy attaches when the jury is empaneled and sworn, *Crist v. Bretz*, 437 U.S. 28, 35 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977), while in a bench trial it attaches when the judge begins to hear evidence, *Lee v. United States*, 432 U.S. 23, 27 n.3 (1977); *Martin Linen Supply Co.*, 430 U.S. at 569; *Serfass*, 420 U.S. at 388, which occurs when the first witness is sworn. *Crist*, 437 U.S. at 32-33.

jurisdiction to try the question of the guilt or innocence of the accused."<sup>135</sup> That the defendant in a criminal prosecution (or some third person) engaged in improper conduct intended to induce the factfinder to render a decision in favor of the accused does not change the objective of the proceeding, and while it may *reduce* the risk of the defendant being convicted, it does not *eliminate* it. The same is true where the accused (or some third person) engaged in conduct aimed at influencing the prosecutor to present a weak case or persuading one or more of the witnesses to commit perjury by testifying favorably to the accused or not to appear at the defendant's trial to testify against her.

For example, a judge bribed by the defendant in a bench trial might change his mind after the start of the trial, return the bribe money, and, after hearing all the evidence, convict her. Or the judge might double-cross the accused and convict her while keeping the bribe money. Similarly, jurors bribed by the defendant might change their minds after the trial commences and join with a sufficient number of disinterested jurors to convict the accused.<sup>136</sup> So too, a prosecutor bribed by the accused to present a weak case might change his mind after the start of trial and present the strongest case possible, ultimately obtaining a conviction. In none of these situations can it be argued that, because the defendant paid off the judge, the prosecutor, or one or more jurors prior to her trial, she was never in "jeopardy" at her trial. For she in fact was convicted.<sup>137</sup> Moreover, absent any reversible trial

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135. *Serfass*, 420 U.S. at 391 (quoting *Kepner v. United States*, 195 U.S. 100, 133 (1904)).

136. A second recent case from Cook County demonstrates that these possibilities are not farfetched. In April of 1993 a federal jury convicted a former Cook County Circuit Court judge of taking \$10,000 to fix the 1986 double murder trial of two leaders of the notorious El Rukn street gang. Sometime after receiving the bribe money, however, the judge apparently suspected that the FBI had learned about the scheme. Instead of acquitting the two gang leaders, the judge convicted them of the double murder, and a jury subsequently sentenced them to death. Although the judge returned the \$10,000 payment to the defendants' attorney before he convicted them, he may not have done so until after the start of the trial. See Matt O'Connor, *U.S. Further Tars Convicted Judge*, CHI. TRIB., June 3, 1994, § Chicagoland, at 1; see also *United States v. Maloney*, No. 91 CR 477, 1994 WL 96673, at \*3 (N.D. Ill. March 23, 1994); *People v. Fields*, 552 N.E.2d 791, 795-96 (Ill.), *cert. denied*, 498 U.S. 881 (1990).

Moreover, as a general matter, an individual unscrupulous enough to accept a bribe payment in the first place might not have any qualms about keeping the bribe money without fulfilling his end of the bargain. Although, if he is dealing with a member of the crime syndicate or a street gang, fear of retaliation might make him reluctant to engage in a double-cross.

137. *Cf. Benton v. Maryland*, 395 U.S. 784, 796 (1969) ("One cannot be placed

error unrelated to the bribery, that conviction, and the sentence based upon it, would stand; no appellate court would accept the claim by the defendant that her conviction should be reversed because a crooked judge, a corrupt juror, or a dishonest prosecutor failed to keep his end of the bargain and acquit her, vote to acquit her, or present a weak case against her, respectively. Thus, even in a case in which the defendant bribed the judge in a bench trial, one or more jurors, or the prosecutor, she still runs the risk—albeit a reduced one—of being convicted, and hence, like any other defendant, is in "jeopardy" for purposes of double jeopardy analysis once she is "put to trial before the trier of facts."<sup>138</sup>

It is even clearer that a defendant who bribed, blackmailed, or intimidated a witness to testify falsely, or not to appear at the trial, is in "jeopardy" once her trial begins. As with a bribed judge, juror, or prosecutor, the witness might undergo a change of heart after the commencement of trial and testify truthfully to facts implicating the defendant in the crime with which she is charged. The factfinder might then rely upon that testimony, along with other evidence introduced at trial, to convict the accused. But even if the bribed, blackmailed, or intimidated witness keeps his end of the bargain and falsely testifies favorably to the accused, or fails to appear, there is no assurance that the factfinder will acquit the accused. Rather, in the former situation, the factfinder might discount the witness' false testimony and rely upon the other evidence presented by the government to convict the defendant, and, in the latter, it might merely rely upon the evidence presented to convict the accused.

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in 'jeopardy' by a void indictment, the state argues. This argument sounds a bit strange, however, since petitioner could quietly have served out his sentence under this 'void' indictment . . .").

138. *Serfass*, 420 U.S. at 388 (quoting *Jorn*, 400 U.S. at 479 (plurality opinion)).

In contrast, a defendant tried in a court lacking jurisdiction over either the accused or the subject matter was never in "jeopardy" because any judgment of conviction rendered by that court would be absolutely void and could be overturned on appeal or collateral attack. *State v. Kenney*, 523 A.2d 853, 854 (R.I. 1987); *State v. Hazzard*, 743 S.W.2d 938, 941 (Tenn. Crim. App. 1987); *Hoang v. State*, 872 S.W.2d 694, 698 (Tex. Crim. App. 1993), *cert. denied*, 115 S. Ct. 177 (1994); *see also* *Ball v. United States*, 163 U.S. 662, 669 (1896) (all proceedings before a court having no jurisdiction are "absolutely void"); *Woodring v. United States*, 337 F.2d 235, 236 (9th Cir. 1964); ("If the trial court had no jurisdiction, [the defendant] just was not in jeopardy the first time."), *cert. denied*, 380 U.S. 933 (1965); *Jackett v. State*, 432 S.E.2d 586, 586 (Ga. Ct. App. 1993) ("[J]eopardy did not attach at [the defendant's] first trial, which was not in a court of competent jurisdiction."); *State v. Hamilton*, 754 P.2d 857, 859 (N.M. Ct. App. 1988) ("[J]urisdiction is essential before jeopardy attaches."); *Commonwealth v. Keenan*, 530 A.2d 90, 93-94 (Pa. Super. Ct. 1987) ("[W]here subject matter jurisdiction is lacking no jeopardy attaches . . .").

A sounder theory for refusing to allow a fraudulently-obtained acquittal to bar a subsequent prosecution for the same offense would be that of "forfeiture."<sup>139</sup> That is, it could be said that a defendant who obtains her acquittal through fraudulent means *forfeits* her right to raise the Double Jeopardy Clause as a bar to a subsequent prosecution for the same offense. This approach places a limit upon the scope of the contemplated exception to normal double jeopardy principles: a second trial would be permitted only where the accused either participated in or acquiesced in the fraudulent conduct leading to her acquittal. For an accused cannot be deemed to have forfeited her protection against double jeopardy when she did not even know about the fraudulent conduct that resulted in her being found not guilty. Such a limitation is sound, however. Fairness dictates that an individual not be stripped of her protection against double jeopardy on account of the conduct of others of which she was unaware, even if that conduct confers a benefit upon her in the form of a judgment of acquittal. Perhaps this explains why many of the text writers and cases indicating the existence of an exception to normal double jeopardy principles for a fraudulently-obtained acquittal limit the exception to situations in which the *defendant* procured the acquittal through fraud.<sup>140</sup>

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139. A defendant cannot be said to "waive" her protection against double jeopardy by engaging in bribery or other improper conduct to obtain an acquittal, because "waiver" of a constitutional right requires "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

140. See *State v. Lee*, 30 A. 1110, 1111 (Conn. 1894) (stating in dicta: "Nor is [jeopardy] exhausted by an acquittal when the verdict has been obtained *through the fraud of the accused*." (emphasis added); *State v. Brown*, 16 Conn. 54, 58 (1843) (stating in dicta that "in all cases of indictments or informations for matters criminal, in which the accused has been acquitted, and his acquittal has not been procured *by his own fraud or evil practice*, he shall not again be put in jeopardy, by a new trial granted upon the motion of the state or the public prosecutor" (emphasis added); *Hylliard v. Nickols*, 2 Root 176, 177 (Conn. Super. Ct. 1795) (stating in dicta that "an acquittal obtained *by forgery and perjury, by the procurement of the prisoner*, would be set aside in favor of the public" (emphasis added); *State v. Jones*, 7 Ga. 422, 424 (Ga. 1849) (stating in dicta that while general rule is that in criminal cases errors are not subject to revision at instance of government, "[a]n exception to this rule is stated to exist, when the acquittal [sic] of the defendant is effected *through his fraud or misconduct*" (emphasis added); *State v. Wright*, 7 S.C.L. (2 Tread.) 517, 519-20 (S.C. Ct. App. 1814) (stating in dicta that "'a new trial ought not to be granted, after an acquittal in a criminal case, *unless the defendant has been guilty of unfair practice*'") (emphasis added and deleted); CHITTY, *supra* note 55, at \*657 ("[I]t seems to be the better opinion, that where the verdict [of acquittal] was obtained *by the fraud of the defendant*, . . . a new trial may be granted." (emphasis added); BISHOP, *supra* note 64, at § 1009 ("[T]here is . . . direct English authority, and there are numerous judicial

Of course, if the basis for the contemplated exception to normal double jeopardy principles is that the defendant whose acquittal resulted from fraud was never in "jeopardy," such a limitation would not apply. For the defendant would not have been in jeopardy at her initial trial, regardless of who engaged in the fraudulent conduct that led to her acquittal. Under this theory, a defendant acquitted because of the fraudulent conduct of another could be retried for the same offense, even though she did not participate in, or even have knowledge of, the fraudulent conduct. Such a result is extremely harsh. The defendant will have suffered the embarrassment, anxiety, and expense of a criminal trial, only to be told later that, because of the fraudulent conduct of a third party—of which she was unaware—the acquittal she obtained in her trial will not be deemed final for double jeopardy purposes and she will once again have to undergo the trauma and expense of a criminal trial, with its concomitant risk of conviction and punishment.<sup>141</sup> Indeed, the harshness

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*dicta*, English and American, to the proposition that if *the defendant's fraud* at the hearing brings about his acquittal, the prosecutor may have a new trial.") (emphasis added); C.J.S., *supra* note 66, at § 217 ("A verdict of acquittal *procured by accused by fraud* and collusion is a nullity and does not put him in jeopardy; and consequently it is no bar to a second trial for the same offense.") (emphasis added); THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW, *supra* note 66, at 593 ("A verdict of acquittal *procured by a defendant by fraud* is a nullity and does not put him in jeopardy, consequently it is a bar to a second trial for the same offense.") (emphasis added); *but see* BISHOP, *supra* note 64, at § 1009 ("A judgment of acquittal upon a verdict procured by fraud will not bar a second trial for the same offense.").

141. It is true that a defendant acquitted in a court lacking jurisdiction can be retried for the same offense, even though she was not responsible for bringing the action in that court. *See supra* text accompanying notes 46-50. However, in that situation—unlike the one where a third party, unbeknownst to the defendant, improperly influences the factfinder, the prosecutor, or a witness—the defendant, through the efforts of her attorney, could have discovered the defect in the proceedings before the commencement of her trial and could have moved to dismiss the charges or transfer the case to the proper court, thereby avoiding a meaningless trial. For example, in *United States v. Khan*, 822 F.2d 451, 454-55 (4th Cir. 1987), where the court reversed a judgment of acquittal entered by a trial court lacking jurisdiction, defense counsel, by examining the applicable Federal Rule of Criminal Procedure, could have determined that the trial court lost jurisdiction in the case when the defendant changed his plea from guilty to not guilty. Similarly, in *State v. Mesman*, 488 So. 2d 1296, 1297-98 (La. Ct. App. 1986), defense counsel, by examining the relevant case law, could have determined that the parish court lacked jurisdiction over the defendant because the defendant was constitutionally entitled to a jury trial. In cases such as these, where the defendant's attorney failed to discover that the trial court in which the defendant obtained an acquittal lacked jurisdiction, it is not unfair (assuming the government acted in good faith in bringing the prosecution in the court lacking jurisdiction, *cf.* *Commonwealth v. Keenan*, 530 A.2d 90, 94 (Pa. Super. Ct.

of this result provides additional support for concluding that any exception to normal double jeopardy principles for a fraudulently-obtained acquittal must rest upon the theory of "forfeiture," rather than upon the notion that the defendant was not placed in jeopardy at her first trial, as does the fact that many of the authorities indicating such an exception exists limit it to cases in which the defendant engaged in fraudulent conduct.<sup>142</sup>

### 3. The Practical Effects of the Contemplated Exception

If the theoretical basis for an exception to normal double jeopardy principles would be that a defendant who fraudulently procures an acquittal forfeits her protection against double jeopardy, the question whether to create such an exception should be answered by examining the practical effects of that exception in light of the underlying purposes of the Double Jeopardy Clause.<sup>143</sup> Assume for the moment that the contemplated exception exists.<sup>144</sup> When a prosecutor brings a charge against an individual for an offense for which she already has been acquitted, that individual will, depending upon the jurisdiction, either move to dismiss the charge on double jeopardy grounds or raise the former acquittal as a special plea in bar.<sup>145</sup>

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1987)) to permit the government to retry the defendant in a court having jurisdiction, even though it forces the defendant to undergo the personal strain and expense of a second trial for the same offense. It must be conceded, though, that the same unfairness condemned in the text exists in cases in which the defendant's attorney *unsuccessfully* raised the issue of jurisdiction in the trial court and, following the defendant's acquittal, a different court, either in a new prosecution brought by the government for the same offense or on appeal, concludes that the trial court in fact lacked jurisdiction over the defendant, the subject matter, or both, and that therefore the defendant can be retried in a court having jurisdiction. *E.g.*, *State v. Hamilton*, 754 P.2d 857, 859 (N.M. Ct. App. 1988) (on appeal following defendant's acquittal on one count and conviction on another, the court held that defendant had been denied constitutional right to counsel at preliminary hearing, which deprived trial court of jurisdiction to try case and the state therefore could retry defendant on both counts without violating double jeopardy provision even though prior to trial, defense counsel unsuccessfully moved to dismiss information on ground defendant was denied constitutional right to counsel at preliminary hearing).

142. See cases cited, *supra* note 140.

143. As indicated earlier, if, because of fraud, the defendant were deemed not to have been in jeopardy at her first trial, the Double Jeopardy Clause would not bar a second trial for the same offense. See *supra* text accompanying notes 131-32.

144. For the reason indicated earlier in the text, the exception would apply only to situations in which the defendant participates in, or acquiesces in, the fraudulent conduct. See *supra* text accompanying notes 139-40.

145. A number of states recognize a plea based upon a claim of double jeopardy.

Where a double jeopardy claim can be raised by a pretrial motion to dismiss the charge, the defendant typically bears the burden of establishing a nonfrivolous *prima facie* claim of double jeopardy.<sup>146</sup> In the context of the present hypothetical, she will satisfy that burden by showing that her former acquittal was for the same offense as the one currently charged. At that point the burden will shift to the government to show that double jeopardy principles do not bar the second prosecution.<sup>147</sup> The government will claim that the prior acquittal does not bar the second prosecution because that acquittal resulted from fraud, such as the bribery of the judge in a bench trial. The accused, on the other hand, will contend that she did not engage in, or even know about, any fraudulent conduct and that the acquittal represented a decision based solely upon the evidence presented at her trial.

A factual issue having been raised, the judge will have to conduct an evidentiary hearing at which the government will bear the burden of proving by a preponderance of the evidence<sup>148</sup> that the prior acquittal resulted from

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*E.g.*, ARK. CODE ANN. §§ 16-85-709 (Michie 1987); CAL. PENAL CODE § 1016 (West 1995); MINN. R. CRIM. P. 14.01; NEB. REV. STAT. § 29-1817 (1989); OKLA. STAT. ANN. tit. 22, § 513 (West 1992); TEX. CODE CRIM. PROC. ANN. arts. 27.02, 27.05 (West. 1989). Although the procedure for assessing a defendant's double claim in these jurisdictions may differ somewhat from that discussed in the text, a plea of a former acquittal typically would be decided in a proceeding conducted prior to the trial on the merits. Consequently, the substance of the analysis in the text will apply in these jurisdictions.

146. *E.g.*, *Grady v. Corbin*, 495 U.S. 508, 522 n.14 (1990), *overruled on other grounds by* *United States v. Dixon*, 113 S. Ct. 2849 (1993); *United States v. Cruce*, 21 F.3d 70, 74 (5th Cir.), *cert. denied*, 115 S. Ct. 174 (1994); *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1360 (11th Cir. 1994); *United States v. Deshaw*, 974 F.2d 667, 670 (5th Cir. 1992); *United States v. Nino*, 967 F.2d 1508, 1510 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1432 (1993); *United States v. Ragins*, 840 F.2d 1184, 1192 (4th Cir. 1988); *People v. Stefan*, 586 N.E.2d 1239, 1248 (Ill. 1992); *State v. Fairfield*, 644 A.2d 1052, 1054 (Me. 1994); *State v. Amerson*, 428 S.E.2d 871, 873 (S.C. 1993).

147. *Cruce*, 21 F.3d at 74; *Baptista-Rodriguez*, 17 F.3d at 1360; *see also Grady*, 495 U.S. at 522 n.14; *Deshaw*, 974 F.2d at 670; *Nino*, 967 F.2d at 1510; *Ragins*, 840 F.2d at 1192; *Stefan*, 586 N.E.2d at 1248; *Fairfield*, 644 A.2d at 1054; *Amerson*, 428 S.E.2d at 873.

148. *See Deshaw*, 974 F.2d at 670; *Nino*, 967 F.2d at 1510; *United States v. Ellender*, 947 F.2d 748, 759 (5th Cir. 1991); *Ragins*, 840 F.2d at 1192; *Amerson*, 428 S.E.2d at 873.

Some states apparently require the defendant to prove the former acquittal, the identity of offenses, and the jurisdiction of the court in the former trial. *E.g.*, *Prince v. State*, 805 S.W.2d 46, 49 (Ark. 1991), *cert. denied*, 113 S.Ct. 1394 (1993); *State v. Fowler*, 357 S.E.2d 329, 330 (Ga. Ct. App. 1987); *Berrios-Torres v. State*, 802 S.W.2d 91, 95 (Tex. Ct. App. 1990); *see also* AM. JUR. 2D, *supra* note 88, at § 466.

the defendant's fraud.<sup>149</sup> Such an evidentiary hearing could be quite lengthy and involved, for it in essence will be a trial of the defendant for bribery, blackmail, intimidation, or the like—albeit with a lower standard of proof than that applicable in an actual criminal trial.<sup>150</sup> Moreover, the stakes for the defendant at this "trial" will be extremely high. If she loses, that is, if the judge finds that she did fraudulently procure the acquittal in her first

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Although it is unclear whether the defendant would also bear the burden of proving she did not procure her former acquittal through fraud, the burden of proof on the issue of fraud *ought* to rest upon the government, for it is the party urging the application of an exception to normal double jeopardy principles applies. To the extent the burden of proof remains on the accused, however, the argument that follows in the text becomes even stronger.

149. To meet this burden the government should be required to prove more than that the defendant participated in, or acquiesced in, improper conduct intended to result in her acquittal. In cases in which the government alleges the defendant improperly influenced the factfinder to acquit her, it also should have to convince the judge that the factfinder in the defendant's first trial reached the wrong result when it acquitted her. That is, the government should have to show that on the basis of the evidence presented in her first trial the factfinder should have found the defendant guilty rather than not guilty. For certainly the government should not be entitled to try the defendant a second time if, despite the fraud, the judge or jury reached the correct decision based upon the evidence presented.

Showing that the factfinder in the defendant's first trial reached the wrong result may be difficult. For example, in his first trial for the murder of William Logan, Harry Aleman raised an alibi defense, claiming that at the time of the slaying he was hitting golf balls at a driving range. Although two eyewitnesses identified Aleman as the man who shot Logan, one of Chicago's most respected criminal defense attorneys characterized the prosecution's evidence against Aleman as "weak," because one of the eyewitnesses was a neighbor of Aleman's who repeatedly told the police after the murder that he could not identify the killer, while the other was a hoodlum who had a motive to tell prosecutors what they wanted to hear. Grady, *supra* note 3, at 1.

The question of what the government should be required to prove to meet its burden becomes more complex in cases in which the government alleges that the defendant either suborned perjury or improperly prevented the factfinder from hearing all the evidence against her, for example, by bribing the prosecutor to present a weak case or by intimidating certain witnesses not to appear at her trial. For in these situations the factfinder did not hear all the available evidence, and in fact may have been misled by false testimony. In these cases the government perhaps should be required to convince the judge that the factfinder in the defendant's first trial would not have acquitted her if it had heard, in the former situation, the truthful testimony of the witness who committed perjury, and, in the latter situation, all the testimony the government would have presented absent the defendant's improper conduct.

150. In a criminal prosecution, due process of law requires proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the defendant is charged. *In re Winship*, 397 U.S. 358, 364 (1970).



trial—whether she in fact did so or not—, the government will be allowed to try her a second time for the same offense, and she will face the possibility of being convicted and punished in that trial. Thus, it is likely that the defendant will expend significant resources to "defend" herself against a serious allegation of criminal conduct<sup>151</sup> and will suffer from the anxiety caused by her realization that she could face the possibility of trial, conviction, and punishment for a criminal offense. This will be true even if the defendant ultimately prevails at the evidentiary hearing.

Furthermore, it is unlikely that the expense incurred and the anxiety suffered by the accused will end at the conclusion of the evidentiary hearing. Regardless of the outcome of that proceeding, the losing party—be it the prosecutor<sup>152</sup> or the defendant<sup>153</sup>—probably will seek immediate review of the decision by a higher court.<sup>154</sup> The accused therefore will be compelled to continue to "defend" herself, this time in the appellate courts. Even if she

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151. Assuming the defendant is not indigent and being represented by appointed counsel. See *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) (Sixth Amendment guarantees indigent defendants right to counsel at government expense in all felony prosecutions); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (under Sixth Amendment, no person may be imprisoned for any offense unless represented by counsel at trial or waived right to counsel); see also 18 U.S.C. § 3006A(e) (1988) (providing for investigative, expert, and other services for indigent defendants at government expense); FLA. STAT. ANN. § 27.54(3) (West, Supp. 1994) (requiring counties provide public defenders' offices with pretrial consultation fees for expert or other potential witnesses consulted before trial); FLA. STAT. ANN. § 914.06 (West Supp. 1994) (requiring trial court award reasonable compensation to be paid by county where indigent defendant requires services of expert witness).

152. See, e.g., 18 U.S.C. § 3731 (1988) (allowing government to appeal from an order of a district court dismissing an indictment or information, except where Double Jeopardy Clause prohibits further prosecution); *People v. Deems*, 410 N.E.2d 8, 11 (Ill. 1980) (interpreting Ill. Sup. Ct. R. 604(a)(1) to allow government to appeal an order dismissing charge on double jeopardy grounds), *cert. denied*, 450 U.S. 925 (1981); N.Y. CRIM. PROC. LAW § 450.20(1) (McKinney 1994) (allowing government to appeal an order dismissing an accusatory instrument or count thereof on, *inter alia*, double jeopardy grounds).

153. See, e.g., *Abney v. United States*, 431 U.S. 651, 661-62 (1977) (order denying pretrial motion to dismiss indictment on double jeopardy grounds immediately appealable under 28 U.S.C. § 1291); Ill. Sup. Ct. R. 604(f) ("The defendant may appeal to the Appellate Court the denial of a motion to dismiss a criminal proceeding on grounds of former jeopardy."); *Commonwealth v. Haefner*, 373 A.2d 1094, 1095 (Pa. 1977) (order denying pretrial motion to dismiss on double jeopardy grounds is final, appealable order).

154. This is precisely what happened in the *Aleman* case. Several days after the trial court denied his motion to dismiss, Harry Aleman appealed that decision to the Illinois Appellate Court.

ultimately prevails, she will have been forced to endure significant additional personal strain and expense to vindicate her right against being twice placed in jeopardy for the same offense.

The Double Jeopardy Clause is intended, among other things, to prevent the government from subjecting an individual to the embarrassment, expense, and ordeal of multiple trials for the same offense and compelling her to live in a continuing state of anxiety and insecurity concerning a criminal charge.<sup>155</sup> Although the evidentiary hearing and any appeal therefrom is not itself a second "trial" for the same offense, it is part of the government's second prosecution of the defendant for the same offense, and the government's objective in that proceeding is to obtain a second trial of the defendant for the same offense. Allowing the government to attack the legitimacy of a judgment of acquittal certainly would frustrate this purpose of the double jeopardy provision, even if the defendant ultimately prevailed on her claim that she did not engage in fraudulent conduct to obtain the acquittal in the first trial.<sup>156</sup>

Moreover, the Double Jeopardy Clause accords special weight to an acquittal in order to reduce the possibility that an innocent defendant will be erroneously convicted at a second trial for the same offense.<sup>157</sup> This purpose also would be frustrated if the government were allowed to attack the legitimacy of a judgment of acquittal. For if the government succeeded in convincing the judge that the defendant's acquittal resulted from her fraud—which it would have to do by only a preponderance of the evidence<sup>158</sup>—it could try her a second time and could "hon[e] its trial strategies and perfect[] its evidence"<sup>159</sup> based upon what it learned at the defendant's first trial, thereby increasing its chances of convicting her even though she may in fact be innocent. Successive trials for the same offense

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155. *Green v. United States*, 355 U.S. 184, 187 (1957); *accord* *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 307 (1984); *Bullington v. Missouri*, 451 U.S. 430, 445 (1981); *United States v. DiFrancesco*, 449 U.S. 117, 127-28 (1980); *United States v. Scott*, 437 U.S. 82, 87 (1978); *Crist v. Bretz*, 437 U.S. 28, 35 (1978); *Arizona v. Washington*, 434 U.S. 497, 504 n.13 (1978); *Abney*, 431 U.S. at 661-62; *United States v. Dinitz*, 424 U.S. 600, 606 (1976); *Serfass v. United States*, 420 U.S. 377, 387-88 (1975); *United States v. Wilson*, 420 U.S. 332, 343 (1975); *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion); *Benton v. Maryland*, 395 U.S. 784, 795-96 (1969).

156. *Cf. Abney*, 431 U.S. at 661-62.

157. *Poland v. Arizona*, 476 U.S. 147, 156 (1986); *DiFrancesco*, 449 U.S. at 130; *United States v. Scott*, 437 U.S. 82, 91 (1978); *see also Green*, 355 U.S. at 187-88.

158. *See supra* text accompanying note 148.

159. *Tibbs v. Florida*, 457 U.S. 31, 41 (1982); *see also Grady v. Corbin*, 495 U.S. 508, 518 (1990), *overruled by United States v. Dixon*, 113 S. Ct. 2849 (1993); *DiFrancesco*, 449 U.S. at 128; *United States v. Wilson*, 420 U.S. 332, 352 (1975).

also may wear down the defendant, thereby increasing the government's chances of convicting her despite her innocence.<sup>160</sup>

Perhaps most importantly, though, allowing the government to prosecute an already-acquitted defendant when the acquittal resulted from fraud would frustrate what the Supreme Court has called "*the* primary purpose of the Double Jeopardy Clause,"<sup>161</sup> namely, "preserv[ing] the finality of judgments"<sup>162</sup> or "protect[ing] the integrity of a judgment."<sup>163</sup> Creating an exception to normal double jeopardy principles when an acquittal resulted from fraud would open up every judgment of acquittal to subsequent challenge by the government.<sup>164</sup> A defendant who went to trial and was found not guilty—whether through fraud or on the basis of the evidence presented at her trial—could never be certain that the government would not at some point—perhaps even years later<sup>165</sup>—haul her into court a second time, alleging that her previous acquittal resulted from bribery, blackmail, intimidation, or the like and forcing her to defend herself, first, against the allegation of fraud and, if she fails on that score, against the criminal charge of which she already has been acquitted. No criminal defendant could ever take her acquittal as final.

In addition, allowing the government to prosecute an individual following her acquittal for the same offense would grant the government an enormous power that could be misused. An unscrupulous prosecutor, upset by the acquittal of a particular individual and bent upon harassing her, could do so by bringing a second prosecution for the same offense and alleging that the prior acquittal resulted from fraud. If the government manages to convince a judge and/or an appellate court that the defendant fraudulently procured her acquittal in the first prosecution, it would have an opportunity to try the defendant a second time. But even if the government fails in its attempt to retry the defendant, it will have forced her to defend herself in what in essence is a trial for bribery, blackmail, or intimidation, and, if the defendant

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160. *Poland*, 476 U.S. at 156; *DiFrancesco*, 449 U.S. at 130; *Scott*, 437 U.S. at 91.

161. *Scott*, 437 U.S. at 92 (emphasis added); see also *DiFrancesco*, 449 U.S. at 128.

162. *Crist v. Bretz*, 437 U.S. 28, 33 (1978); see also *DiFrancesco*, 449 U.S. at 128.

163. *Scott*, 437 U.S. at 92; see also *DiFrancesco*, 449 U.S. at 128.

164. Cf. FRIEDLAND, *supra* note 11, at 296 ("A further danger is that to concede a right of appeal to the Crown in even a limited number of cases makes *all acquittals uncertain* until the time for appeals goes by.") (emphasis added).

165. The state of Illinois re-indicted Harry Aleman for the murder of William Logan sixteen years after Aleman's acquittal for that crime and twenty-one years after Logan's killing.

prevails at that "trial," on appeal. No acquitted defendant would be safe from such a misuse of prosecutorial power.

Any exception to normal double jeopardy principles thus entails significant costs. These costs might be worth incurring if the exception allowed the government to prosecute and convict a large number of individuals who otherwise might avoid punishment for their criminal conduct. However, it does not seem that the contemplated exception would do so. Although the precise number of acquittals obtained through fraud cannot be calculated, it seems fair to conclude that relatively few acquittals in this country result from the bribery, blackmail, or intimidation of the prosecutor, the judge in a bench trial, or one or more jurors in a jury trial, or from the bribery or blackmail of a witness. And while a growing number of acquittals, especially of street gang members in urban areas, may be the result of key government witnesses being killed or intimidated into either refusing to testify at the defendant's trial<sup>166</sup> or perjuring themselves and falsely testifying favorably to the accused,<sup>167</sup> such acquittals are still relatively rare.<sup>168</sup> Moreover, allowing the government to prosecute the defendant a second time despite her acquittal would be unlikely to solve the problem of witnesses who are killed or who are intimidated into perjuring themselves or refusing to appear at the defendant's trial. For allowing the government to retry a defendant who kills a government witness probably would be meaningless, because the dead witness would remain unavailable to testify against the accused, and a witness too frightened by threats to appear at the defendant's first trial or, if she does appear, to testify truthfully in that trial most likely will be too scared to appear and testify truthfully in a subsequent trial of the same person.

Tinkering with the protections of the Double Jeopardy Clause to create an exception covering those relatively rare situations where a defendant procured her acquittal through fraud therefore hardly seems worth the cost. Preserving the finality of all judgments of acquittal and allowing a few guilty defendants to avoid conviction seems preferable to allowing the government to pursue those defendants a second time at the cost of opening up every

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166. Because of the absence of any fraud in the judicial proceeding itself, any exception to normal double jeopardy principles allowing retrial of a defendant following her fraudulently-obtained acquittal might not apply where an honest and noncoerced factfinder acquitted the defendant at a trial where all the witnesses who testified did so truthfully. *See supra* text accompanying notes 126-27.

167. *See* Sam Howe Verhovek, *Gang Intimidation Takes Rising Toll of Court Cases*, N.Y. TIMES (National Edition), October 7, 1994, § 1, at 1.

168. In many cases where one of its key witnesses has been killed, has fled the jurisdiction, or has recanted her story incriminating the accused, the government simply will decide not to proceed to trial and will seek dismissal of the charges because it knows it cannot win the case.

judgment of acquittal to re-examination and of requiring some innocent defendants to defend themselves a second time, perhaps convicting and punishing some of them despite their innocence.<sup>169</sup> Refusing to recognize an exception to normal double jeopardy principles would not leave the government without a remedy against a defendant who obtained a judgment of acquittal through improper means, nor would it encourage defendants to engage in such conduct in an attempt to procure their acquittal. The government certainly could prosecute a defendant for bribery, intimidation, or some other relevant offense dealing with the fraudulently-obtained acquittal, and, if successful, punish her for her misdeeds.<sup>170</sup>

But should an exception to normal double jeopardy principles be recognized for fraudulently-obtained acquittals, it should be of limited scope and contain adequate safeguards to prevent its misuse. First, it should be limited to cases in which the defendant either engaged in improper conduct aimed at procuring her acquittal or knew about the improper conduct of a third person intended to achieve that goal. Thus, the exception would not apply where a third person engaged in improper conduct of which the accused was unaware.<sup>171</sup> Second, the government should be required to prove a causal connection between the alleged improper conduct and the defendant's acquittal. In cases in which the government alleges that the factfinder in the defendant's first trial was improperly influenced to acquit the accused, the government should be required to show that on the basis of the evidence presented in that trial, the factfinder should have convicted the defendant. In cases in which the government alleges that a witness in the defendant's first trial committed perjury or was improperly influenced not to appear at the defendant's trial, or that the prosecutor was improperly influenced to present a weak case against the accused, the government ought to be required to show that the factfinder in the defendant's first trial would not have acquitted her had it had heard, in the former situation, the truthful testimony of the witness who committed perjury, and, in the latter situation, all the testimony the government would have presented absent the improper conduct.<sup>172</sup> Finally, and perhaps most importantly, the government should be permitted to contest the validity of an acquittal only after the defendant (or, in cases in which the

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169. As the Supreme Court has noted on numerous occasions, it is "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); *accord* *Yates v. Aiken*, 484 U.S. 211, 214 (1988); *Rose v. Clark*, 478 U.S. 570, 580 (1986); *Francis v. Franklin*, 471 U.S. 307, 313 (1985); *Patterson v. New York*, 432 U.S. 197, 208 (1977).

170. See FRIEDLAND, *supra* note 11, at 297.

171. See *supra* text accompanying notes 139-40.

172. See *supra* note 147 and accompanying text.

defendant merely knew about the fraud, a third person) has been prosecuted and convicted of the improper conduct in question. That is, if the government seeks to prosecute a defendant following her acquittal for the same offense, on the ground that the acquittal was fraudulently-obtained, it should be able to do so only after convicting the perpetrator of the fraud in a separate criminal proceeding.<sup>173</sup>

## V. CONCLUSION

Ideally, a guilty individual who procured her acquittal through fraud should not be able to take advantage of the Double Jeopardy Clause to prevent the government from trying, convicting, and sentencing her for her offense. Nevertheless, creating an exception to normal double jeopardy principles to prevent such abuse of the Clause has its costs. In addition to requiring an individual to undergo additional personal strain and expense, and granting the government a means to harass acquitted defendants, such an exception would mean that no judgment of acquittal would ever be final. Years after her acquittal an individual might be charged by the government with the same offense and be forced to defend herself a second time. Given the relatively few cases in which a defendant obtains her acquittal through fraud, the game hardly seems worth the candle. The Double Jeopardy Clause therefore should be interpreted to bar a second prosecution for the same offense following an acquittal even though that acquittal may have been the result of bribery, blackmail, intimidation, or other improper conduct on the part of the accused or with her knowledge and acquiescence.

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173. Cf. FRIEDLAND, *supra* note 11, at 310 (concluding that the Crown should be allowed to appeal an acquittal only "when the accused has been found guilty in independent proceedings of improper conduct which may have influenced the verdict[.]").

